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MILITARY GUILTY PLEA INQUIRY: SOME CONSTITUTIONAL CONSIDERATIONS

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MILITARY GUILTY PLEA INQUIRY: SOME CONSTITUTIONAL CONSIDERATIONS

I. Introduction

The enormous growth in the number of criminal cases prosecuted in criminal jurisdictions throughout the United States[1] and the limited judicial resources available has led to increased reliance on the guilty plea and plea bargaining.[2] It has been estimated that more than ninety percent of all criminal convictions in the United States result from guilty pleas.[3] Clearly, the criminal justice system has come to rely on the guilty plea to handle an overwhelming caseload; plea bargaining has emerged as the catalyst for dealing with it.[4] The United States Supreme Court has recognized the modern role of plea bargaining as an "essential component of the administration of justice."[5]

The military justice system processes criminal cases from a segment of United States society which has some unique requirements, but is in many respects a cross-section of the American populace. For fiscal year 1984, 19,175 United States servicemen were tried by court-martial[6] from a total active duty military force of 2,095,000 persons.[7] With such a caseload, the military justice system faces stress similar to that experienced by state and federal criminal systems.[8] The use of plea bargaining to formulate pretrial agreements has been employed in the military justice system since 1953.[9] The prevalence of plea bargaining to resolve cases in the military justice system today is understandable.[10]

Less understandable are the procedural differences regarding trial court acceptance of guilty pleas which have evolved between the United States federal court system and the United States military justice system. The United States Constitution as it applies to pleas of guilty is certainly equally applicable to cases tried in both systems. However, the Congress and military appellate courts have extended protections to the military accused who pleads guilty which transcend constitutional requirements.

This paper will examine the constitutional requirements for trial court acceptance of guilty pleas. These constitutional requirements will then be compared to the statutory and judicial law which has evolved separately in federal and military courts, with emphasis on their distinguishing features. Throughout the analysis, the constitutional role and effect of plea bargaining and its ramifications for both systems will be considered. Analysis will be presented concerning whether special needs of the military accused who pleads guilty require broader safeguards than those which are constitutionally mandated to protect individual rights and/or the integrity of the military justice system.

If existing extra-constitutional procedural safeguards for the military accused are unnecessary, legislative revision and military case law reconsideration are in order to eliminate a guilty plea procedure wasteful of judicial resources. On the other hand, if such safeguards are necessary, they should either be preserved or more efficient alternatives should be implemented to accomplish the desired

effect. This paper will explore both possibilities and propose statutory and case law revision which will foster growth of a streamlined approach to guilty plea procedure in the military courts while simultaneously preserving the integrity of a criminal system designed to provide world-wide justice during times of United States military exigency.

II. Guilty Pleas and the Constitution

A. Background of Guilty Pleas

While guilty pleas are rooted in the early common law, they were initially regarded with much disfavor.[11] English common law courts were very reluctant to accept such an in-court confession and often bullied the defendant into withdrawing the guilty plea or refused to accept his plea.[12] Several explanations for favoring jury trials over guilty pleas during the seventeenth, eighteenth and nineteenth centuries are possible. First, suspects were tried shortly after the occurrence of the offense and trials were short in duration, several often being conducted in a single day.[13] Several differences between these early contested trials and modern American criminal trials explain their brevity: (1) witness recollection was fresh; (2) pretrial investigations were not "burdened" by individual rights and often produced out-of- court confessions; (3) virtually all relevant evidence was admissible at trial; (4) no lawyer appeared for the prosecution or the defendant, who spoke for himself; (5) jury instructions by the court were perfunctory.[14] Thus,

neither guilty pleas nor plea bargaining were needed to expedite early common law criminal trials.

This disfavor for guilty pleas had an intangible aspect which transcended the mere lack of necessity for expedience. At times, early English courts and writers approached the mere possibility of driving the innocent to conviction with a large degree of paranoia.[15] There seemed to be a presumption that a criminal defendant who pleaded guilty was almost incompetent, which may have been due in part to the fact that stakes were high during that time. Death was the prescribed punishment for over 220 felonies in England in 1819.[16] The absence of a defense counsel at trial rendered the judge the sole protector against undue suffering by an accused with no legal knowledge[17] and was likely the single most important factor in the disfavor with which guilty pleas were viewed. Receipt of appropriate legal advice by a criminal defendant continues to be an important factor in the development of many aspects of the law concerning guilty pleas.

The common law caution regarding guilty pleas continued during American law development. However, in 1892, the United States Supreme Court first upheld a conviction of a criminal defendant who pled guilty to a charge of murder.[18] The Court concluded that the plea was voluntarily made and the defendant was deprived of no right or privilege within the protection of the Fourteenth Amendment of the United States Constitution.[19] Guilty pleas still were not prevalent in the American criminal law system until the 1920's.[20] A major factor in this attitudinal change was the emergence of the plea bar-

gaining phenomena in the United States.[21]

B. Background and Constitutionality of Plea Bargaining

During the early development of the common law, the courts had no occasion to address plea bargains. Guilty pleas were regarded as a "confession;" thus, the common law rule which invalidated out-of-court confessions obtained in exchange for a promise of leniency would also apply to a guilty plea which was an in-court "confession" in exchange for a promise of leniency.[22] That factor, combined with the predisposition against guilty pleas in general, probably explains the early absence of plea bargaining.

There are some indications that plea bargaining took place in America as early as the Civil War.[23] The tendency among appellate courts during that time was to uphold guilty pleas only in cases where explicit bargaining between the prosecution and the defense had not taken place.[24] In the Whiskey Cases, the United States Supreme Court first addressed the issue of plea bargaining.[25] There, the prosecutor struck a bargain with defendants whereby they each agreed to plead guilty to one count of a federal indictment in exchange for their agreement to testify against other officials.[26] The Court nullified the portion of the agreement concerning guilty pleas, but approved the prosecutorial practice of bargaining for testimony in exchange for non-prosecution.[27] One commentator noted:

> As the Whiskey Cases reveal, the common law did permit a sacrifice of the public interest in punishing a single offender

> in order to gain his assistance in convicting other criminals, and it devised an open and regularized form of bargaining to accomplish this result. Nevertheless, the court apparently did not countenance bargaining for pleas at all.[28]

With the arrival of the twentieth century, the gap between appellate court disapproval of plea bargaining and actual practice widened.[29] By the 1920's, plea bargaining was a de facto feature of American criminal justice systems.[30] As greater caseloads increase the strain on the justice system in modern times, the importance of plea bargaining has intensified. However, debate concerning its efficacy and constitutional propriety has never subsided.

Many commentators have attacked the use of plea bargaining to resolve the dilemma facing the overburdened criminal justice system. As stated by one author:

> The criminal justice system has become a complex bureaucracy preoccupied with its "capacity to apprehend, try, convict and dispose of a high proportion of criminal offenders whose offenses become known" and guided by the need for speed and finality. Presently, a set of informal decisions by police and prosecutors separate the apparently innocent from the presumably guilty. Because of administrative pressure, little subsequent attention can be given to these initial determinations, and they are most often confirmed quickly by a guilty plea or a dismissal of charges. The scrutiny of the criminal trial process is lost. Indeed, the primary purpose of plea bargaining is to assure that the jury trial system established by the Constitution is seldom utilized.[31]

Plea bargaining is often criticized as undermining the accused's constitutional privilege against self-incrimina-

tion under the Fifth and Sixth Amendment rights of confrontation, compulsory process and jury trial. In support of this position, authors have cited policy reasons against plea bargaining: (1) trials make the legal process visible, serving as a lesson in fairness to the accused and the public;[32] (2) exercise of the accused's constitutional rights checks the exercise of government power;[33] (3) sentencing decisions which should reflect criminal justice goals of rehabilitation, incapacitation, deterrence and retribution are made on the basis of administrative efficiency;[34] (4) the Constitution prescribes the protection accorded by fundamental guarantees of the Fifth and Sixth Amendments, but makes no provision for their suspension in the interests of administrative economy;[35] (5) plea bargaining encourages many accused to forego constitutional rights in cases where "weak" evidence would not have sustained a conviction at trial.[36] These factors often loom large in the background of court considerations of various aspects of the guilty plea.

Proponents of plea bargaining generally take a pragmatic approach: (1) it is an economically necessary phenomena resulting from lack of resources necessary to provide universal jury trials; (2) no adequate remedies exist to enforce abolition of plea bargaining and attempts to do so force it back into the closet.[37] In 1970, the United States Supreme Court finally began to acknowledge with approval the practice of plea bargaining. In Brady v. United States, the Court analogized plea bargaining to tactical situations wherein a defense lawyer might advise his client to plead guilty in

order to secure the lenience of a particular judge vice a jury trial.[38] In that case, the Court specifically declined to hold "that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged."[39] In Santobello v. New York, the United States Supreme Court was emphatic in its endorsement of plea bargaining:

> The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called "plea bargaining," is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities. Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pretrial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.40

Several times since Santobello was decided, the Supreme Court has reaffirmed the role of the plea bargain as an important part of American criminal justice.[41] Despite criti-

cism from many legal scholars since 1970, the United States Supreme Court remains firm in refusing to recognize plea bargaining itself as a constitutional issue. Recently, in Mabry v. Johnson, the Court stated:

> A plea bargain alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest. It is the ensuing guilty plea that implicates the Constitution.42

Thus, while plea bargaining now plays a siginificant role in American criminal justice systems, the constitutional focus has been on the resulting guilty plea itself.

C. Constitutional Requirements of Voluntariness and Understanding

The United States Supreme Court gave early recognition to the significance of a guilty plea. In United States v. Kercheval, the Court emphatically observed: "A plea of guilty differs in purpose and effect from a mere admission or an extra-judicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence."[43] Once an accused enters a guilty plea, the fundamental rights to contest nonjurisdictional defects in the trial, to a trial by jury, to confront adverse witnesses, to contest the admissibility of adverse evidence, to reduce self-incrimination and to present evidence in self-defense are waived.[44] Thus, a plea of guilty by an accused has serious ramifications.

1. Voluntariness Requirement

It has long been the position of the United States Supreme Court than a confession must be free and voluntary and not produced by inducements engendering either hope or fear.[45] In 1927, the Court held that this standard also applied to guilty pleas and embellished the standard by requiring that "a plea of guilty shall not be accepted unless made voluntarily after proper advice with full understanding of the consequences."[46] This "voluntary and understanding" standard has been the constitutional measure of guilty pleas since that time, although some courts use the terms "intelligent" and "knowing" interchangeably with the term "understanding".[47] The standard became more reviewable in 1969 when the Supreme Court, in Boykin v. Alabama, held that the trial record must disclose that the accused voluntarily annd understandingly entered a guilty plea.[48] However, the Court has not been precise in defining what voluntariness means. As noted by one author:

> "When it states that a waiver is involuntary, the Court sometimes means that the state has engaged in conduct that impaired the defendant's capacity for self determination either by breaking his will or by preventing him from making a free and unconstrained choice. At other times, however, the Court means that the state has engaged in conduct that is offensive or that falls below judge-created standards of decency.[49]

Because the range of governmental conduct extends from threats of physical violence which would clearly invalidate a guilty plea[50] to more subtle forms of compulsion, deciding

which behavior renders pleas involuntary becomes more difficult.[51] Various decisions of the United States Supreme Court have given some constitutional definition to the requirement that a plea be voluntarily made. A threat by FBI agents to publish untrue statements about the defendant to incite the public to call for his execution was held to coerce an involuntary guilty plea by the Court in Waley v. Johnson.[52] In Townsend v. Burke, the Supreme Court held that, where an accused was held incommunicado for forty hours by government agents, his guilty plea thereafter was not coerced[53] A coerced extra-judicial confession induced a guilty plea which was held to be involuntary by the Court in Herman v. Claudy.[54]

In United States v. Jackson, the Supreme Court struck down a section of the Federal Kidnapping Act which provided that the death penalty could only be awarded by jury; the statute coerced defendants to plead guilty with sentencing by the judge to insure that capital punishment would not result.[55] However, only two years later, in Parker v. North Carolina, the Court found a defendant's plea to be voluntary under a statutory arrangement providing a lower maximum penalty for defendants pleading guilty than those contesting charges for the same offense.[56] The Supreme Court weakly distinguished Jackson on the basis that it involved an unconstitutional death penalty statute while the issue in Parker was strictly the voluntariness of the guilty plea.[57] The Court in Parker also refused to invalidate the guilty plea on grounds that an involuntary extra-judicial confession coerced

the guilty plea.[58] The trial record was rife with indications that the coercive effects of the illegal confession had dissipated by the time the guilty plea was entered.[59]

In McMann v. Richardson, the Supreme Court held that a defendant represented by counsel could not plead guilty at trial and later petition, without more, for habeas corpus, claiming he pled guilty because of a prior coerced confession.[60] In both Parker and McMann, the Supreme Court reaffirmed its decision in Brady v. United States; all three cases were decided on May 4, 1970.[61] In Brady, the Court reaffirmed that a guilty plea induced by coercion, threat, intimidation, deception or trick is involuntary, but that plea bargaining does not, of its own accord, flaw a plea.[62] In Parker, McMann and Brady (hereinafter referred to as the Brady trilogy), the Court based its voluntariness discussion largely on the presence of competent defense counsel in court with the accused when the guilty plea was entered.[63]

Since the decisions in the Brady trilogy were handed down, the United States Supreme Court has considered no guilty plea cases which turned directly on the voluntariness requirement. However, the Court has indicated that it has not waivered in its view of the effects of voluntariness in the guilty plea context. In 1976, the Court decided Hutto v. Ross, a case in which the defendant made a plea bargain which was not conditioned on his extra-judicial confession.[64] After signing a confession, the defendant retained a second attorney and withdrew from the plea bargain, changing his plea to

not guilty.[65] The Court held that his confession was voluntary and could be used against him at trial.[66] Although Hutto v. Ross did not involve a guilty plea, it demonstrates the Court's continuing propensity to view voluntariness as a matter isolated from other factors in the case.

In Corbitt v. New Jersey, the Supreme Court approved a state statutory scheme which allowed a plea of non vult to murder, thus authorizing a sentence of thirty years imprisonment vice a mandatory sentence of life imprisonment for the defendant who unsuccessfully contested his case.[67] The Court indicated that a guilty plea under such a statute would not be coercive.[68] In 1983, the Supreme Court upheld the guilty plea of a defendant made after the prosecutor had clearly withdrawn from the plea bargain, in Mabry v. Johnson,[69] again viewing the guilty plea in a vacuum when deciding that it was voluntarily made.[70] Many authors have assailed the Court's position that an accused may voluntarily plead guilty to an offense despite tempting plea bargains and statutory schemes offering "safer" alternatives to a contested case. One author states:

> That a defendant rationally chose between available alternatives does not establish voluntariness. The Court has long recognized that a choice is not voluntary merely because the actor was free from the more obvious and oppressive forms of physical coercion. Whenever a defendant waives a constitutional right to avoid an unpleasant result, a court must determine whether the waiver was induced by promises or threats which deprive it of the character of a voluntary act.71

The protestations of such authors notwithstanding, it appears

that the United States Supreme Court will remain intractable in its views of the constitutional voluntariness requirement for guilty pleas.

2. Understanding Requirement

While often considered coexistent with the voluntariness requirement, the constitutional understanding requirement for guilty pleas has been a more fertile source of litigation since Boykin v. Alabama[72] was decided in 1969. Because the determination of a defendant's understanding of the legal consequences of a guilty plea is subjective by nature, the United States Supreme Court has struggled to provide objective standards to measure his knowledge. That effort has generated many sub-issues to be considered in the constitutional review of guilty pleas. The Court has concentrated on three primary issues relating to whether a guilty plea is understandingly entered: (1) the waiver of an accused's rights and defenses; (2) the competence of the accused to plead guilty; (3) information disclosed to the accused during the guilty plea colloquy.

The Brady trilogy previously discussed indicated that a guilty plea constitutes a waiver of the right to attack all non-jurisdictional defects in a criminal case.[73] Prior to that trilogy of decisions, many courts held that a defendant must "knowingly" waive each of the defenses possible in entering a guilty plea. As stated by the United States Court of Appeals, Fifth Circuit, in United States v. Lucia:

> A plea of guilty is an abbreviated way of going down the list of possible defenses

> and privileges...and waiving each one. The plea represents the relinquishment of a bundle of defenses, and has no magical implications with regard to finality beyond that. The whole does not exceed the sum of its parts. If one of the component waivers was ineffective because of the inadequate knowledge upon which it was made, the defect is not cured by virtue of the fact that the waiver was made implicitly, as part of the guilty plea.74

Had Lucia prevailed as the common law rule for guilty plea waiver of rights, the constitutional understanding requirement may have taken a different shape. However, the United States Supreme Court has continued its extension of the waiver language of the Brady trilogy. In 1973, the Supreme Court decided Tollett v. Henderson, reasoning:

> [A] guilty plea represents a break in the chain of events which preceeded it in the criminal process. When a criminal defendant has solemly admitted in open court that he is in fact guilty of the offenses with which he is charged, he may not hereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.75

The Supreme Court has reaffirmed the Brady trilogy waiver doctrine in several other cases. In Blackledge v. Perry, the Court approved the waiver rationale while sustaining the defendant's right to attack the trial court's jurisdiction despite a guilty plea.[76] Similarly, the Court upheld the defendant's rights to challenge a conviction on grounds of double jeopardy, even though he pleaded guilty at trial in Menna v. New York.[77] In Haring v. Prosise, the Supreme Court reaffirmed Tollett's bar to a guilty-pleading defendant's attack on governmental deprivation of rights occurring prior

to the conviction, but nevertheless allowed him to seek damages under 42 U.S.C. Section 1983.[78]

Several common threads run through the Brady trilogy and its guilty plea waiver progeny. First, the cases reemphasize the Supreme Court's tendency to consider the constitutional knowing requirement of guilty pleas in isolation. In recognizing the finality of guilty plea trials through the Brady waiver doctrine, the Court has accorded some semblance of stability to a criminal system which has come to explicitly rely on plea bargaining to handle its huge case load. In other words, the Court has implicitly decided that an accused should not reap the benefits of a plea bargain and then later be allowed to assert possible defenses to his crime through the avenue of habeas corpus. Second, the Court has often relied on the accused's factual guilt to support its waiver arguments. Third, the Court placed overwhelming emphasis on the assistance of a competent counsel in the defendant's entry of a guilty plea. As stated by the Court in Tollet, the defendant "may only attack the voluntary and intelligent character of guilty pleas by showing that the advice received from counsel was not within the range of competence demanded by attorneys in criminal cases."[79] These tendencies pervade the Supreme Court's consideration of guilty pleas and are critical to an analysis of the constitutional understanding requirement.

Because of the Brady trilogy's waiver doctrine, some legal scholars have argued that the uncertainties of a poten-

tial defense present the accused with a dilemma when a beneficial plea bargain is available. Thus, the defendant may opt to plead guilty to an offense without gaining a true understanding of the consequences thereof and waive all non-jurisdictional defects that have occurred, impacting the constitutionality of the plea.[80] Several authors have suggested that an accused in such a position should be allowed to enter a conditional plea, whereby denial of a dispositive defense motion could be appealed despite entry of a guilty plea.[81] The Supreme Court has never considered the conditional guilty pleas available in the federal courts, but approved state procedures which permitted a non-jurisdictional defect to be raised on appeal after a guilty plea in Lefkowitz v. Newsome and Haring v. Prosise.[82] Absent conditional pleas, the Brady trilogy's waiver doctrine remains viable. The Court has shown no signs that it will recognize the dilemma it creates regarding the understanding requirement as being of constitutional significance.

In considering the understanding requirement for guilty pleas, the United States Supreme Court has also addressed the defendant's competence. In Brady v. United States, the Court indicated that the accused possessed sufficient understanding to plead guilty because, inter alia, "there was nothing to indicate that he was incompetent or otherwise not in control of his mental faculties..."[83] In other cases, the Supreme Court has indicated that convictions of legally incompetent persons violate due process.[84] Although the Court has not spoken directly on the issue, most United States Courts of

Appeal have applied the same common law standard to both competency to stand trial and to competency to plead guilty.[85] The standard for federal courts was adopted in Dusky v. United States; the Supreme Court indicated the "test must be whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him."[86] Again, the Court focused on the defendant's relationship with his attorney, this time to define competency.

Once the threshhold issue of the accused's competency to plead guilty was crossed, the effectiveness of the legal representation afforded to the accused was in issue in each of the Brady trilogy cases.[87] In those cases the Court absolutely linked competency of counsel to the understanding requirement for guilty pleas. In McMann, the Court stated: "Whether a plea is unintelligent and therefore vulnerable... depends as an initial matter, not on whether the court would retrospectively consider counsel's advice to be right or wrong, but on whether the advice was within the range of competence demanded of attorneys in criminal cases."[88]

During the time since the Brady trilogy was decided, the United States Supreme Court has been reluctant to strike down guilty pleas on grounds they were not understandingly made due to ineffective assistance of counsel. One author attributes that fact to the reluctance of judges in general to pass critical judgment on attorneys:

> When the issue is described as the competence of counsel, a court is apparently required to make an ad hominem judgment about a member of the bar. When a court asks about the knowing quality of a defendant's choice, it focuses directly on his state of mind and can thereby avoid, or at least mute, any intimation of professional insult. In practice, judges tend to close ranks when members of the legal profession are threatened, and partly for this reason, courts have usually defined the right to effective assistance of counsel in narrow terms. Although some courts have articulated more generous standards in the period since the guilty-plea trilogy was decided, most courts refuse relief on grounds of ineffective assistance unless the proceedings were "a farce, and a mockery of justice."[89]

Against this background of judicial hostility toward ineffectiveness of counsel issues, the United States Supreme Court has continually emphasized the importance of the Sixth Amendment right to counsel in its decisions. In Gideon v. Wainwright, the Court stated: "The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."[90] In United States v. Ash, the Supreme Court indicated that "the core purpose of the counsel guarantee was to assure 'assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor."[91] The Court held that the Constitution guarantees the defendant adequate legal assistance and a competent attorney in Cuyler v. Sullivan[92] and Engle v. Isaac.[93]

The Supreme Court's rhetoric notwithstanding, two of its recent decisions demonstrate a continued judicial reluctance to find that a defense counsel is incompetent. In

United States v. Cronic, the Court refused to apply an inference that a defense counsel, who was experienced only in real estate matters, had never tried a criminal or jury case and who was given only 25 days to prepare the defense, was incompetent.[94] The Court indicated that there was no showing "that counsel failed to function in any meaningful sense as the Government's adversary."[95] In Strickland v. Washington, the Supreme Court mandated highly deferential judicial scrutiny of counsel's performance:

> Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.[96]

The Strickland majority held that to overcome the presumption of competency of defense counsel, "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a

probability sufficient to undermine confidence in the outcome."[97]

Given the heavy burden placed on an accused to show ineffectiveness of counsel, it is difficult for him to prevail on that issue in a contested case, where the defense counsel's performance is a matter of record. However, it has been suggested that an accused attacking the understanding requirement of a guilty plea by demonstrating counsel incompetence has an even more difficult task for several reasons: (1) the defense counsel's plea bargaining sessions with the prosecutor are not public; (2) the defense counsel's conferences with the accused are not a matter of record; (3) the standards of counsel performance in an unstructured bargaining situation are not clear.[98] Thus, although the United States Supreme Court holds open the possibility of a guilty-pleading defendant attacking the plea on grounds it was not understandingly made due to defense counsel ineptitude, it may be difficult to sustain such a position. This may result from the underlying desire of the Court to preserve the "orderly administration of justice" in American criminal justice systems which rely heavily on the plea bargain by making most guilty pleas unassailable.[99]

Another critical aspect of the understanding requirement is the information which must constitutionally be conveyed to the accused during the guilty plea colloquy at trial. Early on, the United States Supreme Court required that an accused must receive notice of the charges against him[100] and be informed of their nature[101] in order to enter

an intelligent guilty plea. In general, the Supreme Court has not required that the accused be advised as to the elements of the offense(s) alleged against him. However, where the accused waived the right to counsel, the Court indicated that the trial judge must insure that she understood the nature of the charges prior to accepting a guilty plea, in Von Molke v. Gilles.[102] In McCarthy v. United States, the Court stated: "because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant understands the law in relation to the facts."[103] Further, the Supreme Court requires a criminal trial judge to not only ensure that an accused pleading guilty has "full understanding of what the plea connotes" but also to leave a "record adequate for any review that may be later sought."[104]

Although the elements of the offense need not be explained on the record, the Supreme Court held that the accused must be informed of the intent element of the charged offense to enter a knowing plea in Henderson v. Morgan.[105] The Court implied that a record indicating that the defense counsel had explained the nature of the offense to the accused or that a presumption that such was accomplished would have sufficed.[106] However, the trial court in Henderson made a factual finding that the intent element had not been explained to the accused, so the Court was constrained to hold that his plea was not understandingly made.[107] In Marshall v. Lonberger, the Supreme Court held that a defen-

dant knowingly pled guilty even though the record did not specifically indicate that he was informed of the nature of the charges, relying on the Henderson presumption that the accused's lawyer had informed him of the nature of the offenses to which he pled.[108] Thus, the accused's attorney again plays an important role in the Court's constitutional determination of whether the accused was sufficiently apprised of the nature of the offense(s) during the guilty plea colloquy to knowingly plead guilty.

Another aspect of the constitutional understanding requirement for guilty pleas is the accused's awareness of the consequences of such a plea before it is entered. The United States Supreme Court has not made any definitive statements regarding the matter. In Kercheval v. United States, the Court indicated that a plea of guilty should be accepted only "after proper advice and with full understanding of the consequences."[109] Later, Supreme Court cases indicated that, at least where the accused was not represented by counsel, he must be informed of the potential punishment for the offense(s) to which a guilty plea was entered.[110] In Boykin v. Alabama, the Court indicated that the trial judge bears the responsibility for conveying such information to the accused: "What is at stake for the accused facing death or imprisonment demands the utmost solicitude of which the courts are capable in canvasing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequences."[111]

The only case in which the United States Supreme Court

has addressed the accused's understanding of the consequences of pleading guilty was United States v. Timmreck.[112] The trial court had accepted the accused's guilty plea without informing him of the mandatory five year special parole term attached to the offense.[113] The Court held that, in the absence of a showing of prejudice to the accused, the oversight was neither jurisdictional nor constitutional and upheld the guilty plea.[114] The Supreme Court left open the possibility that judicial failure to fully acquaint the accused with the sentencing consequences of a guilty plea may render the plea constitutionally infirm if the accused is prejudiced thereby.

United States Circuit Courts of Appeal have held that an understanding guilty plea constitutionally requires an attorney to inform his or her client of the maximum sentence imposeable.[115] However, as discussed earlier, it is unlikely that the Supreme Court would require more than an assertion in the record of trial that such information was conveyed to uphold a guilty plea. As indicated in Henderson v. Morgan, the Court would likely presume that a competent counsel had completely informed the accused.[116] The Court's recent statement regarding an extrajudicial confession is also relevant to the understanding requirement for guilty pleas: "This Court has never embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness."[117] Such a pronouncement is consistent with the Court's approach to the understanding requirement of

guilty pleas

In Von Moltke v. Gillies, the United States Supreme Court held that, prior to accepting a guilty plea from an accused not represented by counsel, the trial judge must review possible defenses to the charge(s).[118] Generally, consideration of whether an intelligent guilty plea requires that the accused be informed of the possible defenses occurs in cases involving defense counsel. In the Brady trilogy cases, the Court found that potential defenses did not impact the understanding guilty plea of an accused represented by competent counsel.[119] The Court essentially presumed that the defenses were considered by the accused and counsel and refused to require the court to address defenses during the guilty plea colloquy. In Tollet v. Henderson, the Court indicated that it is not necessary for the accused's attorney to discuss all defenses with his client prior to entry of a knowing guilty plea.[120] In both Menna v. New York[121] and Blackledge v. Perry,[122] the Supreme Court allowed the defendants to make habeas corpus assertions of defenses that were not raised at trial. However, in those cases the Court did not hold that the guilty pleas were not understandingly made, but instead found that the habeas corpus claims attacked the jurisdiction of the trial courts.[123] The Court did not suggest that either the trial court or the accused's counsel was required to inform the accused of potential substantive defenses prior to entry of a knowing guilty plea.[124] Given the tenor of the Supreme Court's decisions regarding the constitutional understanding requirement, it is unlikely that

it will burden either trial courts or defense counsel with the requirement of reviewing all potential defenses with the accused prior to acceptance of a guilty plea.

D. Constitutionality of Equivocal Guilty Pleas

As discussed, a guilty plea must be voluntary and understanding. Underlying these constitutional requirements is the historical notion that a defendant may waive certain constitutional rights only by judicially confessing guilt.[125] As stated by the United States Supreme Court in Brady v. United States, "Central to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment."[126] In 1970, the Supreme Court cast a new light on the constitutional consideration of guilty pleas when it decided North Carolina v. Alford.[127]

Alford was charged with first-degree murder by North Carolina after the shotgun killing of an acquaintance.[128] Although Alford professed innocence, his attorney could find no witnesses to support his claim and a plethora of circumstantial evidence supported the state's case.[129] In the face of such overwhelming evidence, Alford agreed to the prosecutor's plea bargain offer and pled guilty to a charge of second-degree murder.[130] Prior to acceptance of the guilty plea, a police officer and two other witnesses testified, summarizing the state's evidence against the accused.[131] Alford also testified, proclaiming his innocence and indicating that he was willingly pleading guilty, but only because

he feared that the state's evidence would convict him and subject him to capital punishment.[132] The trial court finally accepted Alford's guilty plea and he was sentenced to thirty years of imprisonment.[133] He unsuccessfully petitioned for habeas corpus on grounds that his plea was invalid because it was coerced in the state court, the United States District Court for the Middle District of North Carolina and the United States Court of Appeals for the Fourth Circuit.[134] Finally, in 1967, after Alford again unsuccessfully sought habeas corpus in the United States District Court, the United States Court of Appeals, Fourth Circuit reversed, granting the writ.[135] That decision was vacated by the United States Supreme Court in 1970, holding that Alford's guilty plea was voluntarily and intelligently entered.[136]

In rejecting Alford's claim, the Court specifically reaffirmed the constitutional test for guilty pleas, stating: "The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action."[137] The Court relied heavily on the factual circumstances of the accused's case which pointed overwhelmingly towards his guilt.[138] Its decision found support in two prior Supreme Court cases, Lynch v. Overholser[139] and Hudson v. United States.[140] In Lynch, the Court indicated that the trial judge could have constitutionally accepted a guilty plea to an offense with a one-year prison term possible even though the evidence raised a possible insanity defense.[141] Hudson held that a federal court

may impose sentence based on a plea of nolo contendere, in which the defendant does not admit guilt.[142] The Court reasoned that nolo contendere cases recognize the constitutionality of pleas in which the accused is unwilling to admit guilt and that it was not significant that such pleas may be designated as "guilty pleas", stating:

> Thus, while most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty. An individual accused of crime may voluntarily, knowingly and understandingly consent to the imposition of a criminal sentence even if he is unwilling or unable to admit his participation in acts constituting the crime.[143]

The Supreme Court once again viewed the voluntary and understanding requirements in isolation in determining that Alford's guilty plea was not coerced. Rather than finding the plea to be coerced by the circumstances, the Court essentially determined that the circumstances were probative of Alford's rationality in pleading guilty; Alford voluntarily took a reasonable course after being carefully apprised of the facts and alternatives in his case by a competent attorney. Thus, Alford's protestations of innocence did not negate the constitutionality of his guilty plea.

The decision in Alford was not unanimous. Justice Brennan was joined by Justices Douglas and Marshall in a short dissent which opined that Alford's decision to plead guilty was so tainted by his fear of the death penalty that it was involuntary.[144] One author suggested that the decision had no precential basis because: (1) a guilty plea

could historically be accepted only when accompanied by an express admission of guilt; (2) the Court and the Hudson decision misread the common law regarding nolo contendere; (3) Lynch v. Overholser did not involve a guilty plea by a defendant who denied factual guilt.[145] However, it is difficult for critics of the Alford decision to argue that it is in the accused's best interest to "protect" his constitutional rights by forcing him to trial on the merits in the face of overwhelming evidence. Thus, much of the academic commentary supports Alford.[146]

Since North Carolina v. Alford was decided, the Supreme Court has rendered no decisions turning directly on the constitutionality of equivocal guilty pleas. However, Alford's rationale continues to be reaffirmed by the Court. In his concurring opinion in Henderson v. Morgan, Justice White again asserted that a defendant's intelligent conclusion that his best interests require a guilty plea in the face of strong government evidence despite his claimed innocence constitutes "what may be viewed as a third method of establishing a defendant's factual guilt."[147] Other Supreme Court decisions have approved plea bargaining in scenarios which tended to discourage the accused's assertion of his trial rights.[148] In both United States v. Cronic and Mabry v. Johnson, the Court has recently reaffirmed its holding in Alford.[149] If any Supreme Court movement is discernable in the years since Alford was decided, it is in the direction of a more stolid recognition of the principles therein espoused.

E. Constitutional Right to Plead Guilty

The holding in Alford that a trial court may constitutionally accept an equivocal guilty plea makes sense in a nation with criminal systems which depend heavily on the plea bargain to function efficiently. If a criminal defendant may put aside protestations of innocence to take advantage of a favorable plea bargain in the face of overwhelming government evidence, the question is raised whether he has a constitutional right to plead guilty in order to do so. Conversely, can the prosecuting authority force an accused to his constitutional right to trial, thus exposing him to the possibility of a significantly greater punishment on conviction?

On several occasions, the United States Supreme Court has specifically declined to recognize any right in the accused to plead guilty. In both Lynch v. Overholser and Santobello v. New York, the Supreme Court embraced the concept that a trial court "may reject a guilty plea in the exercise of sound judicial discretion."[150] In North Carolina v. Alford, the Court stated:

> Our holding does not mean that a trial court must accept every constitutionally valid guilty plea merely because a defendant wishes so to plead. A criminal defendant does not have an absolute right under the Constitution to have his guilty plea accepted by the court....the States may bar their courts from accepting guilty pleas from defendants who assert their innocence.[151]

Legal authors have occasionally suggested that the court's discretion in rejecting guilty pleas should be limited.[152] However, the suggestion has not been raised in

the constitutional context. As suggested by the Supreme Court in Alford, recognition of a right to make a voluntary and understanding plea of guilty will come at a state, vice federal, level. If such a right were recognized, however, judicial discretion in the acceptance of guilty pleas could not be totally eliminated or the trial court could not establish that the pleas were voluntary and understanding, and thus constitutional. There appears to be little chance that the Supreme Court will recognize a constitutional right to have a guilty plea accepted.

III. Guilty Pleas in the Federal Courts

A. Statutory and Regulatory Background

United States District Court procedure for taking pleas is set forth in Rule 11, Federal Rules of Criminal Procedure (hereinafter referred to as Rule 11).[153] Rule 11 was promulgated by the United States Supreme Court pursuant to the authority vested by the Congress in 18 U.S.C. Section 3771.[154] Prior to 1966, Rule 11 provided only abbreviated guidance to federal trial courts regarding pleas. One author described its subsequent transition:

> Rule 11, dealing with pleas of guilty, not guilty, and nolo contendere, was formerly ("old rule") a fairly brief set of general guidelines that remained to be fleshed out by the courts. Largely as a result of case law development, the rule was amended in 1966 ("1966 rule") to specify more fully the conduct required by the trial judge in accepting a plea. In substance, the 1966 rule added the conditions that the judge personally address the defendant, include the defendant's understanding of the consequences

> of the plea as an element in determining voluntariness, and be satisfied that a factual basis for the plea existed.155

The constitutional voluntary and understanding requirements and other constitutional requirements were incorporated into Rule 11. For example, section (g) of the current version of Rule 11 reflects the Supreme Court's decision in Boykin v. Alabama, requiring that a guilty plea trial record reflect a voluntary and understanding plea.[156] In McCarthy v. United States, the Court recognized the purposes of Rule 11: (1) to assist the trial court in determining the constitutionality of the plea; (2) to produce a complete record of the plea.[157] To achieve those purposes, the Court in McCarthy required United States District Courts to directly inquire of the accused as to the voluntary and understanding nature of his plea, and held that failure to comply with Rule 11 required a guilty plea to be set aside.[158]

In 1975, Congress approved extensive amendments to Rule 11 further reflecting case law development and providing more detailed guidance to courts regarding pleas.[159] With the impetus of the Supreme Court's decision in Santobello v. New York, the amendments for the first time required that plea bargaining be revealed in open court.[160] The 1975 version of Rule 11 was further amended in 1979 in two respects: (1) a plea bargain requiring a prosecutor's sentencing recommendation does not give the defendant a right to withdraw the plea even though the court does not accept it; and (2) a section regarding the admissibility of pleas, plea discussions, and related statements in subsequent hearings was added.[161]

The 1975 amendments to Rule 11 also brought substantial changes concerning the advice to be given to a defendant regarding nolo contendere and guilty pleas.[162] Rule 11 now requires that the defendant be personally addressed in open court and informed of his rights.[163] The defendant must also be advised regarding: (1) the nature of and penalties possible for the offense to which he pleads; (2) his rights to counsel; (3) the trial rights he is relinquishing by the plea; (4) the possibility that if he is questioned under oath about the offense to which he has pled, his answers could later be used against him in a prosecution for perjury or false statement.[164] The 1982 amendments to Rule 11 added a requirement that the defendant be warned of the possibility of special parole terms.[165] In 1985, Rule 11 was further amended to require a warning that restitution may be awarded.[166]

Other substantive changes to Rule 11 in 1975 included modifications requiring the trial court to make inquiry to determine that there is a factual basis for the plea.[167] In 1983, a section was added allowing conditional pleas which preserve appellate review of specified pretrial motions despite a plea of guilty or nolo contendere, with the approval of the trial court and the prosecution.[168] As discussed earlier in this paper, the Supreme Court has not recognized a constitutional requirement for allowing such pleas, but permitted the adoption of such procedure as a measure to preserve prosecutorial and judicial resources.[169] The 1983

amendments also added a section which provided that the harmless error standard for appellate review be applied to the rule.[170]

Rule 11, as modified over the years, establishes the statutory standards for federal court acceptance of guilty pleas. The rule is theoretically designed to function in two ways: (1) it protects defendants by enhancing the fairness of plea proceedings; (2) it accords a measure of finality by regulating plea negotiations.[171] Whether or not Rule 11 actually functions as planned depends on the judicial interpretations of its requirements.

B. Federal Court Guilty Plea Inquiries

Rule 11 provides procedural requirements for federal courts to satisfy the constitutional mandate for guilty pleas. As the Rule has developed in complexity, it has spawned significant federal case law. In addition to the constitutional requirements for guilty pleas, federal courts have also interpreted Rule 11 to provide extra-constitutional protection to the accused. Accordingly, the guilty plea colloquy in federal trial courts has grown in complexity and is rife with requirements which could lead to reversal by appellate courts, if not met.

1. Court Advice to the Accused During Federal Court Guilty Plea Inquiry

The federal courts have generally held that Rule 11 requires the nature of the charges to be explained to the accused in some detail to insure that a guilty plea is voluntarily and understandingly made.[172] Use of forms during the

guilty plea colloquy has met with approval, but not as a substitute for the court's personal addressal of the accused.[173] The mere reading of an indictment to the accused has been held to not satisfy the requirement that the court personally explain the nature of the offense to the accused.[174] However, where the federal trial judge has the charges read to the defendant and ascertains that they were explained in detail previously by counsel, no equivalent of a jury charge by the court is normally required prefatory to acceptance of a guilty plea.[175] Prior to the 1966 amendments to Rule 11, the courts were generally able to satisfy the knowing requirement with regard to nature of the charges by simply asking the accused if he understood.[176] In deciding whether the accused has received adequate explanation of the nature of the charge(s), the federal courts have been prone to consider his or her intelligence and mental capacity in conjunction with the advice provided by the court.[177]

Prior to the 1975 amendments to Rule 11, the federal courts were not required to explain penalties to the guilty pleading defendant.[178] Since that time, courts have read the Rule 11 requirement of informing the accused of the mandatory minimum penalty imposed by law somewhat restrictively. That requirement has not been held to require the court to calculate the earliest possible release date including credit for good behavior and parole and so inform the defendant.[179] The trial court need not inform the accused of the probability of one sentence or another, only of the mandatory minimum and

maximum sentences imposeable.[180] The federal courts have been unanimous in not requiring the trial judge to apprise the accused of the concurrent or consecutive running of sentences prior to acceptance of a guilty plea.[181]

The courts have split concerning literal compliance with the Rule 11 requirement to inform the accused of the mandatory maximum sentence imposeable. Courts have given approval to: (1) the trial judge informing the accused of the maximum aggregate sentence,[182] the accused being informed of the maximum penalty during arraignment vice the plea hearing;[183] (3) not informing the accused of the maximum penalty at all when circumstances indicated that he knew of the punishment possible.[184]

On the other hand, several Fifth Circuit Court of Appeals cases have been reversed for want of literal compliance with this aspect of Rule 11.[185] For example, the United States Court of Appeals, Fifth Circuit, overturned a guilty plea case in which the trial court incorrectly advised the accused of a greater punishment than was actually possible.[186]

A majority of the federal court appellate decisions hold that the trial judge need not inform the accused of all parole possibilities during the guilty plea colloquy.[187] The United States Court of Appeals, Third Circuit has held that the requirement that the accused be informed of any special parole term under Rule 11(c)(1) does not require that the accused be advised of ordinary parole matters during the guilty plea inquiry.[188] A small minority of federal courts

have held that the trial court must inform the accused of regular parole consequences of his guilty plea prior to its acceptance.[189] The federal appellate courts have also not required that the accused be informed by the trial judge that parole revocation may be a consequence of the plea during the guilty plea hearing.[190]

The federal appellate courts have been nearly unanimous in requiring literal compliance with Rule 11(c)(1) which was part of the 1982 amendments to insure the defendant's understanding of special parole terms during the guilty plea inquiry.[191] Prior to the 1982 Amendments, the majority of federal cases already provided such a requirement,[192] but cases were divided on the depth of the explanation required of the trial court.[193] The United States Court of Appeals, Ninth Circuit recently upheld the conviction of an accused who pled guilty but was not informed of the special parole term until after the guilty plea was entered when he indicated understanding and raised no objection.[194]

Other types of advice required to be provided to the accused during the guilty plea inquiry have engendered little case law. Two circuits of the United States court of appeals have held that the trial judge need not advise the guilty pleading accused of his right to be represented by an attorney if he is represented by a lawyer at the guilty plea hearing.[195] The federal court decisions have varied somewhat regarding the specificity with which an accused must be informed of his rights at trial and waiver of those rights. Despite the requirements of Rule 11, one circuit of the

United States court of appeals upheld a case in which the accused was not informed of his right against self-incrimination during the guilty plea colloquy.[196] Trial courts are required to specifically warn of waiver of rights to jury trial,[197] but most cases have not required that an exhaustive list of constitutional rights waived by a guilty plea be provided to the accused.[198] The federal appellate courts generally do not reverse when the trial court fails to warn the accused that his answers under oath during the guilty plea hearing could be used against him in a subsequent proceeding.[199]

2. Insuring the Voluntary and Understanding Nature of Guilty Pleas in the Federal Courts

As previously discussed, Rule 11 incorporated the constitutional voluntary and understanding requirements for acceptable guilty pleas. Federal appellate cases have developed procedural requirements to assist trial courts in their efforts to ascertain the constitutionality of pleas. In addition to the specific advice which must be provided to the accused during the guilty plea colloquy, Rule 11 requires that the trial court go further to insure the constitutionality of the plea.[200] To do this the trial court accepting a guilty plea must personally address the accused in a manner which varies from case to case.[201] Utilization of standard guilty plea colloquies or truncated inquiries have often caused reversal.[202] The practice of addressing multiple defendants during a guilty plea inquiry has been held to satisfy the requirement that the accused be personally

addressed.[203] The federal appellate courts have split on whether an officer of the court other than the judge may conduct the guilty plea inquiry.[204] The depth of the guilty plea inquiry conducted by the trial judge varies with the nature of the charge, the accused's background, whether he was represented by counsel and other circumstances surrounding the case.[205]

Because a court cannot gauge a defendant's subjective understanding of his guilty plea, federal appellate courts have looked to other objective circumstances in the record to uphold pleas. In a recent case decided by the United States Court of Appeals, Fifth Circuit, the court considered both the trial judge's discussions with the accused and with his attorney to uphold the guilty plea as being knowingly made.[206] On the other hand, misrepresentations by a defense counsel which persuade the accused to reasonably plead guilty under a mistaken impression may cause the plea to be overturned.[207] Courts have also looked to forms used in conjunction with the guilty plea colloquy to test the defendant's understanding of his plea. Recently, the United States Court of Appeals, Eleventh Circuit, upheld a guilty plea even though the form used was misleading.[208] During the guilty plea colloquy, federal trial judges have not been called upon by appellate courts to question the accused in any particular manner. The senses and perceptions of the court must be creatively utilized to test whether a plea is knowingly made. Thus, the circumstances of the guilty plea and the competency

and mental status of the accused must be determined by diligent inquiry from the trial judge.[209] In the absence of specific indications that an accused was incompetent or intoxicated at the time of his plea, appellate courts have generally held that mere status as an alcoholic or drug addict does not impact the entry of an understanding guilty plea.[210]

Similarly, a federal trial court must be alert to conduct a reasonable inquiry in order to determine the voluntariness of a guilty plea.[211] Federal appellate courts have generally held that the trial judge must specifically inquire whether the accused is pleading guilty because of prior discussions with the prosecutor[212] and whether the guilty plea resulted from force or threats.[213] However, a plea is not involuntary because it was motivated by fear of greater punishment or by hope of a more lenient sentence.[214] The federal courts have consistently held that guilty pleas motivated by false promises of defense counsel or prosecutors will render a plea involuntary.[215] On the other hand, a guilty plea motivated by hopes for drug treatment and the misjudged strength of the government's case have been held voluntary.[216] In fact, guilty pleas motivated by reasonable tactical trial decisions of the accused which were erroneous in hindsight have been upheld.[217] Extra-judicial confessions of the accused have also generally not rendered his subsequent guilty plea involuntary.[218] To insure that a guilty plea is voluntarily entered, the trial judge must embark on a meaningful dialogue with the accused which will reveal all

relevant facts. However, the remarks of the judge during the trial must themselves be chosen with care lest they be held coercive of the guilty plea.[219]

3. Federal Court Involvement with Plea Bargains

Since Supreme Court recognition of plea bargaining, the federal district courts have moved to consider plea bargains on the record. Rule 11 allows the federal trial judge to accept or reject a plea bargain.[220] Generally, the federal appellate courts have held that a trial court has a duty to insure that a plea bargain meets the requirements of reasonableness from the standpoint of public interest.[221] The trial court must also inquire into the circumstances surrounding a plea bargain and their potential impact on the voluntary and understanding nature of the attendant guilty plea.[222] However, the trial court must be careful not to participate in the actual plea bargaining discussions to avoid possible attacks on the voluntary nature of the guilty plea.[223] The federal trial court judge's inquiry must be thorough enough to reveal all promises made in connection with a plea agreement.[224] In this manner, the trial court can evaluate and preserve for the record any governmental overreaching and circumstances which affect the constitutionality of the guilty plea.

Although Rule 11 does not specify when the federal trial court should require notification of the existence of a plea agreement, the inquiry usually takes place when the guilty plea is offered.[225] The trial judge must warn the

accused that, if the plea bargain includes an agreement by the prosecutor to recommend or not oppose a particular sentence, that provision is not binding on the court and does not entitle the defendant to withdraw the plea if the sentence imposed does not comport with such provision.[226] Federal appellate courts have compelled literal compliance with this warning requirement, automatically reversing cases in which it was not given.[227] Thus, interjection of plea bargaining into the federal guilty plea colloquy has further impeded acceptance of a voluntary and understanding guilty plea.

4. Determining the Factual Basis for the Guilty Plea in Federal Courts

Since the 1966 amendments to Rule 11, federal trial courts cannot accept a guilty plea without the judge inquiring into and being satisfied that there is a factual basis for such plea.[228] As discussed earlier in this paper, there is no constitutional requirement that a factual basis for the offense be established prior to acceptance of a guilty plea.[229] Rule 11 is a procedural requirement in addition to constitutional protections. The protective nature of the factual basis inquiry was described by the Advisory Committee on the Federal Rules of Criminal Procedure: "Such inquiry should, e.g., protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge."[230] When a federal trial

court establishes that no factual basis for a guilty plea exists, it should normally set aside the plea and enter a not guilty plea.[231]

There is also no constitutional requirement that an accused admit factual guilt to enter a voluntary and understanding guilty plea.[232] Rule 11 indicates no intent to impose such an extra-constitutional requirement on federal courts.[233] A federal trial court judge must be subjectively satisfied that a factual basis exists for a guilty plea at trial.[234] This satisfaction may, but need not necessarily come from the accused personally, as long as the factual basis is developed on the record.[235] Federal appellate courts have been very liberal in allowing trial courts to rely on virtually all facts available to establish factual basis,[236] but they may not rely on assumptions of fact which may potentially be open to dispute.[237]

Federal appellate courts have allowed reliance on factual basis established during sessions of the court prior to the guilty plea colloquy. Factual basis may be established by a prior guilty plea inquiry,[238] evidence entered while the accused was still contesting the case,[239] the defendant's confession read into the court record at the preliminary hearing of the trial,[240] the pre-sentence report,[241] material from a grand jury proceeding introduced by the prosecutor at a guilty plea inquiry,[242] and factual synopsis prepared by the prosecution and verified by the defendant in court.[243] Some courts have merely looked to the indictment in the case to establish the factual basis.[244]

Some federal appellate courts uphold guilty pleas when no factual basis for the guilty plea is established, taking the position that the factual basis requirement of Rule 11 is not constitutionally required and that pleas should be invalidated only if not voluntarily and understandingly made.[245] Other courts have held that failure to satisfy the factual basis requirement is not an independent basis for invalidating a guilty plea, but may be relevant in determining whether a plea is intelligently made.[246] Thus, while the factual basis requirement of Rule 11 is a potential barrier to the acceptance of guilty pleas by federal district courts, it has been narrowly read by appellate courts.

C. Federal Trial Court Discretion and the Guilty Plea

As discussed earlier, the criminal trial court clearly cannot accept a guilty plea which does not withstand scrutiny of due process standards for the waiver of constitutional rights.[247] However, Rule 11 has introduced uncertainty among the appellate circuits regarding the discretion of a trial court judge to reject a guilty plea. Rule 11 imparts both implied and direct discretionary powers to the trial judge to reject guilty pleas. Section (c) of Rule 11 implies that the trial court may reject a guilty plea if not satisfied with the accused's understanding of the mandatory advice conveyed to him under the rule.[248] Similarly, section (d) prohibits the court from accepting a guilty plea if it determines that the plea is involuntary.[249] If the trial judge determines that no factual basis exists for a guilty plea, the court may

discretionarily reject it under section (f), Rule 11.[250] Federal courts have been specifically vested with the discretion to reject or accept plea agreements under section (e) of Rule 11.[251] Federal appellate courts have differed in their focus on the standards applicable and trial court considerations in exercising discretion to reject a guilty plea.

Prior to the adoption of the plea agreement portion of Rule 11 in 1975, most cases simply acknowledged the trial court's discretion to reject an otherwise proper plea.[252] However, one line of cases arose in the District of Columbia Circuit of the United States Court of Appeals which implied limitations to such discretion.[253] In McCoy v. United States,[254] Griffin v. United States,[255] and United States v. Hoskins, the District of Columbia Circuit took the position that a guilty plea should be rejected only for "good reason." In determining what constitutes "good reason", the court focused on the prosecutor's need to encourage a guilty plea through plea bargaining vice inconsistencies in the factual basis for the plea.[256] In 1974, the District of Columbia Circuit decided United States v. Ammidown, holding that the trial court must consider three factors in rejecting a plea bargain: (1) fairness to the defendant; (2) prosecutorial discretion; (3) judicial discretion to sentence.[257] The court further required the trial court to provide a statement of reasons for a discretionary rejection of a plea bargain.[258]

In United States v. Martinez,[259] United States v. Maggio,[260] and United States v. Cowan,[261] the United States

Court of Appeals, Fifth Circuit, indicated some willingness to follow the District of Columbia Circuit's plea bargain discretion cases. In those cases, the Fifth Circuit applied the "good reason" standard, holding that the trial court's discretion to reject guilty pleas and plea bargains was not limitless.[262] However, after the 1975 amendments to Rule 11, the Fifth Circuit decided United States v. Bean, holding that the trial judge retains discretion to reject plea bargains under the rule and is not required to state reasons for doing so.[263] In Bean, the court indicated that the 1975 amendments to Rule 11 may have eroded the Ammidown standard for discretionary court acceptance of plea bargains.[264]

Since Ammidown was decided in 1974, most federal courts have either distinguished it or flatly rejected its holding.[265] The federal courts have been nearly unanimous in holding that a trial judge has discretion in rejecting pleas.[266] There has also been no discernable trend toward requiring the trial judge to list the reasons for a discretionary rejection of a plea bargain.[267] Federal judicial discretion to reject guilty pleas and plea bargains is nearly unbridled. Ammidown did not result in any discernable movement toward establishment of standards for rejection of pleas.

The United States Court of Appeals, Ninth Circuit, has left open the possible argument that a trial court does not have absolute discretion to reject a plea bargain. In United States v. Miller, the Ninth Circuit held that a categorical rule refusing to accept any plea bargains whatsoever exceeded

the discretionary power vested by Rule 11.[268] The court relied on a separation of powers rationale to suppport its argument that the judiciary should remain independent of executive affairs, which include prosecutorial decisions.[269] Although reaffirming judicial discretion to reject plea bargains, the court cautioned against judicial creation of broad rules limiting prosecutorial independence.[270] To insure maintenance of a proper balance between prosecutorial independence and judicial discretion, the Ninth Circuit required trial courts to set forth the prosecutor's reasons for framing the plea bargain and the court's justification for rejection thereof.[271] There is thus far no indication that Miller will engender a return toward the holding in Ammidown. However, the Ninth Circuit has used the separation of powers analysis in three recent cases to strike down discretionary trial court dismissal of charges.[272] This analysis may become the basis for future limits on the discretion of federal trial courts to reject plea bargains in other circuit courts of appeal.

D. Guilty Plea Trend in the Federal Courts

The trend in the federal courts is toward more active involvement by the trial court in the acceptance or rejection of guilty pleas. Since 1966, Rule 11 has grown tremendously in terms of both volume and impact on pleas. More specific regulatory guidance over the acceptance of guilty pleas, along with the case law it has spawned, has somewhat handcuffed the trial courts to patterned procedures which must be

meticulously followed to avoid appellate court reversal. Those requirements are intended to ensure that: (1) the guilty pleading accused receives specific constitutional advice; (2) he receives complete information and advice concerning his plea bargain; (3) a factual basis for the guilty plea is established. Ostensibly, if the trial court follows the pattern established for it by Rule 11 and federal case law, it will be able to reach a reasonable conclusion as to whether a guilty plea is voluntarily and understandingly made, as required by the United States Constitution.

Despite the trend toward more guidance for the trial court regarding acceptance of guilty pleas, a rule of reason has prevailed in the federal courts. Recognizing that Rule 11 is not a constitutional mandate, appellate courts have frequently upheld guilty pleas in the face of technical violations of the rule. Further, the enormous discretion vested in federal trial courts regarding acceptance of plea bargains has fostered the notion that the trial judiciary functions as a watchdog of sorts, insuring that both the interests of the public and the accused are well served. Such discretion has to some degree freed federal trial courts from being second-guessed by the appellate courts. However, broad discretion can cut two ways, rendering certain trial court decisions virtually unreviewable and affording the accused little opportunity to ensure receipt of the benefits of a plea bargain.

IV. Guilty Pleas in the Military Courts

A. Statutory and Regulatory Background

The Uniform Code of Military Justice (UCMJ) was originally enacted by the United States Congress in 1950 pursuant to Article 1, section 8 of the United States Constitution to provide a statutory framework for trial by court-martial and punishment of military offenses.[273] The UCMJ authorized military courts-martial to try military criminal cases, defined military offenses and punishments, and set forth the basic procedure for such trials.[274] Article 45, UCMJ, provides guidance for the taking of pleas from an accused tried by court-martial.[275] A court-martial may enter a finding of guilty to a charge to which an accused has pled guilty, except: (1) when the accused enters an irregular pleading; (2) when the accused sets up a matter inconsistent with the plea; (3) when the accused improvidently pleads or lacks understanding of the plea's meaning and effect; (4) when the accused withdraws the plea of guilty prior to announcement of sentence; (5) when the accused pleads guilty to a charge for which the death sentence may be adjudged.[276] In these cases or if the accused refuses to plead, Article 45, UCMJ requires the court to enter a plea of not guilty on his behalf.[277]

Article 36, UCMJ, authorizes the President of the United States to prescribe rules governing pretrial, trial and post-trial procedures in cases tried under the UCMJ.[278] By Executive Order 12473, Manual for Courts-martial, United States, 1984 (MCM, 1984), the President prescribed such procedures.[279] Rules for Courts-martial (RCM) 910, MCM, 1984 is

the military equivalent of Rule 11 and is patterned after the federal rule.[280] Section (a) of RCM 910 provides for pleading alternatives and conditional pleas similar to those found in Rule 11; it also includes the Article 45, UCMJ prohibition of guilty pleas when the death penalty is possible but it does not provide for pleas of nolo contendere.[281] Except for references made to nolo contendere pleas, section (c) of RCM 910 requires the same substantive advice be given to the accused as does the federal rule.[282] Section (d) of both the military rule and the federal rule are likewise strikingly similar regarding the inquiry to be made by a court concerning the voluntariness of a guilty plea.[283] RCM 910, section (e) has no federal equivalent and specifically requires the military judge to establish a factual basis for the plea through inquiry of the accused.[284]

The plea bargaining procedure in the military is unlike that in the federal courts so the provisions of RCM 910 and Rule 11 regarding plea agreement inquiries are not comparable.[285] RCM 705, MCM, 1984, provides procedural guidance for military pretrial agreements.[286] All military courts-martial are convened by a commanding officer in the accused's chain of command designated as the convening authority (CA) by MCM, 1984, and all pretrial agreement negotiations must be undertaken with that person.[287] In pretrial agreements, the accused may agree, inter alia, to plead guilty to one or more offenses in exchange for the CA's promise to exercise options such as: (1) referral of charges to a certain type of forum (e.g., Special Court-martial vice General Court-martial); (2)

referral of a capital offense as noncapital; (3) withdrawal of certain charges; (4) directing the prosecutor not to present evidence on a charge; (5) taking specified action on the sentence (e.g., suspend, mitigate or defer).[288] A pretrial agreement that was not voluntarily made by the accused or effectively deprives the accused of constitutional rights is not enforceable.[289] Military pretrial agreement offers must originate with the accused and his counsel, must be reduced to formal written agreements upon acceptance by the CA, and the accused may withdraw from the agreement prior to the announcement of sentence.[290]

During the military plea inquiry, RCM 910 requires the military judge to inquire about the existence of any pretrial agreement prior to acceptance of a guilty plea and examine the agreement for compliance with RCM 705.[291] As part of the guilty plea inquiry, the military judge must then question the accused, the defense counsel, and the government counsel to ensure that the accused understands the agreement and that all parties are in agreement about its terms.[292] If there is a lack of understanding or disagreement as to terms, the military judge may either allow the accused to withdraw from the pretrial agreement, or, with the consent of the CA, conform its terms to the accused's understanding.[293] Unlike Rule 11, RCM 910 includes no provision for the military judge to flatly reject a pretrial agreement.[294] RCM 910 and Rule 11 are similar in requiring that the record of trial reflect the inquiry made during the guilty plea proceedings.[295]

Article 45, UCMJ has been amended somewhat from its original form in 1950.[296] Subsection (b) was changed in 1968 to allow a finding of guilty by the military judge upon his acceptance of the plea.[297] This amendment was intended by Congress to delete the former practice of assembling the members of a court-martial to perform a ritualistic vote on the findings to conform with common law practice and that of the federal district courts.[298]

Congress had good reasons to be cautious when it first enacted the UCMJ. The 1950 version of the UCMJ required that qualified members of the bar of a federal court or the highest court of a state be appointed as defense counsel only for accused tried by General Court-martial (GCM).[299] Trials by Special Court-martial (SPCM) can award a jurisdictional maximum punishment consisting of a bad-conduct discharge, six months confinement, reduction to the lowest enlisted paygrade and forfeiture of two-thirds pay for six months and have historically comprised an overwhelming majority of the military caseload.[300] Thus, when Congress passed the original UCMJ in 1950, it was cognizant of the prospect that large numbers of military persons would face trial with serious possible consequences without representation by qualified counsel. The Senate report which accompanied passage of the 1950 UCMJ reflected that concern and protective philosophy:

> It is also contemplated that the regulations will provide that the law officer or the court shall explain the meaning of any special defenses or objections which may appear to be available to the accused, <u>in any case in which he is not represented by counsel</u>,

> and shall advise him of his right to make them, both as to the offense charged and lesser included offenses, before pleading to the general issue.[301]

In enacting the 1950 UCMJ, Congress also made recommendations for Manual for Courts-martial provisions which further reflected its concern regarding guilty pleas without counsel: (1) if an accused refused a defense counsel, his guilty plea should be refused; (2) in pleading guilty, the accused must admit to the acts charged; (3) the guilty plea procedure should be set forth in the record of trial verbatim; (4) the accused pleading guilty should be advised by the court as to any applicable statute of limitations.[302] By Executive Order 10214, the President prescribed the MCM, 1951, which not only included the recommended items but also went much further.[303] After the 1968 amendments to the UCMJ, the MCM was again also amended in 1969.[304] One amendment required that qualified counsel be appointed for accused tried by SPCM as well as GCM.[305] However, the special protections afforded by paragraph 70 of MCM, 1951 were continued in 1969 and remain in substance in MCM, 1984.[306] Thus, Article 45, UCMJ as it stands today still reflects congressional concern about the military accused's lack of qualified representation at most courts-martial. That Congress banned guilty pleas in death penalty cases, required refusal of guilty pleas if any matter inconsistent with guilt came to light at trial, and wielded its influence to insure that MCM provisions required the military courts to act as de facto defense counsel in accepting such pleas.[307]

B. Military Court Guilty Plea Inquiries

1. Court Advice to the Accused During Guilty Plea Inquiry in Military Courts

As the procedural regulatory requirements for acceptance of guilty pleas in military courts have grown, case law has developed to interpret them. Some of the requirements of RCM 910 are an embodiment of military case law. For instance, the requirements that a military guilty plea inquiry must be personally conducted by the military judge[308] and elicit a personal response from the accused[309] result from United States Court of Military Appeals (COMA) decisions. Other cases have gone beyond statutory and regulatory requirements for guilty pleas.

In United States v. Care, COMA decided the seminal military case involving conduct of the guilty plea colloquy.[310] In that case, the court specifically required that certain advice be given to the accused prior to acceptance of his guilty plea(s), most of which is now included in RCM 910.[311] In addition to describing the nature of the guilty plea inquiry to be conducted in all trials by court-martial, the court specifically required that the accused be advised (1) of the maximum punishment imposeable; (2) that by his plea of guilty, he gives up the right against self-incrimination, the right to a trial on the merits by a court-martial, and the right to confront and cross-examine any witnesses against him; (3) of the elements of each offense to which he pleads guilty.[312]

The Rule 910 and Care requirement that an accused be informed by the court as to the maximum possible penalty provided by law has generated a number of appellate decisions.[313] In United States v. Zemartis, COMA ruled that such advice must include the effect of recidividist escalated punishment clauses possible under the UCMJ.[314] Whether misadvice regarding maximum punishment is cause for reversal of a guilty plea has largely depended on whether the misadvice caused a "substantial misunderstanding" on the part of the accused. In United States v. White, COMA struck down a guilty plea entered after the accused was mistakenly informed that a bad-conduct discharge was possible for the offense.[315] COMA upheld a guilty plea when the accused was advised that he was subject to a forefeiture of pay, but was not informed that he could also be fined, because there was no substantial difference between the two.[316] In cases where large discrepancies exist between the actual amount of confinement possible for a guilty pleading accused and the amount that the court informed the accused was possible, COMA has invariably overturned the plea.[317] However, in two recent cases, COMA has upheld the guilty plea by looking to the terms of the pretrial agreement to impute knowledge of maximum punishment to the accused when the military judge failed to specifically inform the accused of the maximum punishment.[318] Thus, although COMA has narrowly interpreted the requirement that the accused be informed of the maximum punishment possible prior to acceptance of a guilty plea, it has shown recent signs of flexibility.

The elements of each offense chargeable under the UCMJ are set forth in the MCM, 1984, and COMA has generally held that their mere recitation will establish compliance with the advice requirements of Care and RCM 910.[319] Failure to list the elements of an offense prior to acceptance of the accused's guilty plea has generally caused military cases to be overturned.[320] COMA has held that, in a case involving a conspiracy charge, the military judge must inform the accused of both the conspiracy elements and those for the underlying substantive offense during the guilty plea inquiry.[321] In a recent Navy-Marine Court of Military Review (CMR) decision, the court indicated that a guilty plea may not be invalid when the military judge fails to specifically advise the accused of one element, if the accused reveals facts during the inquiry that indicate knowledge of the element.[322] Thus, while at least one CMR has indicated willingness to liberally interpret RCM 910, COMA has generally interpreted it narrowly.

In other cases, military appellate courts have been protective of the accused by affirmatively requiring trial courts to provide advice prior to acceptance of a guilty plea. COMA recently held that, unless the record of trial otherwise demonstrated understanding on the part of an accused, the military judge must specifically advise him of his right to assert the statute of limitations during the guilty plea inquiry.[323] While the military cases have not required the trial judge to inform the accused of administrative

consequences of his guilty plea (e.g., discharge processing), COMA has encouraged such disclosure.[324] Some efforts have also been made to encourage military courts to inform the accused of appellate rights waived by guilty pleas.[325] Further, military appellate decisions have held that the trial court must inform the accused of his rights to counsel and will make no presumption that the accused has received such advice from any other source.[326] The military appellate courts have thus been quite inflexible in interpreting the RCM 910(c) requirements for advice to the accused during the guilty plea inquiry.

2. Insuring the Voluntary and Understanding Nature of Guilty Pleas in the Military Courts

RCM 910, section (d) provides procedural guidance to assist military courts in ensuring that the constitutional voluntary and understanding requirements are met.[327] The military appellate courts have interpreted RCM 910 expansively. To satisfy itself that a military guilty plea is voluntary and understanding, the trial court is required to engage the accused in discourse more incisive than questions merely answered in the affirmative or negative by the accused.[328] Thus, the military judge must be innovative in his effort to elicit relevant information concerning the offenses during a guilty plea inquiry.

Military case law has placed some limitations on the military judge's involvement in the guilty plea process. COMA has held that a military judge's intervention in the plea bargaining process may improperly influence the accused's

decision to plead guilty.[329] Similarly, false assurances to an accused that unlawful search and chain of custody issues would survive his guilty plea on appeal was held to invalidate the plea as involuntary.[330] Further, a military judge's admonition implying that, if a defendant proceeded with pre-plea motions, the sentence limitations in his pretrial agreement might be jeopardized was held to vitiate a guilty plea.[331] Finally, the Air Force CMR has gone so far as to require courts to affirmatively place on the record government efforts to condition acceptance of a plea bargain on defense agreement to refrain from motions or presenting extenuating and mitigating matters during sentencing.[332] Thus, in accepting military guilty pleas, the military judge must travel the path between too little and excessive inquiry.

In assessing the voluntary and understanding nature of a guilty plea under RCM 910, military appellate courts have considered representation by an apparently competent defense counsel and the "probability that the accused and his counsel weighed the evidence and determined that it was inadequate for an effective legal defense..."[333] In United States v. Hannan, COMA held that it was the duty of the defense counsel, not the military judge, to inform the accused of the potential impact of parole on the sentence imposed pursuant to a guilty plea.[334] In Hannan, the court intimated that a guilty plea induced by the accused's attorney's misinformation as to the nature of the sentence possible is not understandingly made.[335]

The importance of United States v. Care goes beyond the

previously discussed requirement that certain advice be provided to the accused during the guilty plea colloquy.[336] That decision also required military trial courts to inquire into specific areas to evaluate the voluntariness and understanding of the accused's guilty plea.[337] Care required the military judge to specifically test the accused's understanding of the following: (1) his right to plead not guilty and place the burden of proving his guilt beyond a reasonable doubt on the prosecution; (2) that, by his guilty plea, he gives up the rights against self-incrimination, to be tried on the merits by a court-martial, and to confront and cross-examine witness against him; (3) the elements of the offense(s); (4) the maximum punishment to which he will be subjected by his guilty plea; (5) discussions with his counsel concerning the meaning and effect of his plea; (6) whether he has been forced or coerced to plead guilty; (7) whether it is in his own best interest to plead guilty; (8) whether the plea is a product of his own will and desire to confess his guilt; (9) his right to withdraw his plea prior to the announcement of sentence.[338] Thus, the military trial court must not only provide specific information to the accused during a guilty plea inquiry, but must also make delineated types of inquiry to satisfy itself that the plea is voluntarily and understandingly made.

The military appellate courts have strictly interpreted the requirments of United States v. Care in evaluating knowing pleas. Although the guilty plea admits all the elements

of the offense charged, the accused must understand the law in relation to the facts for his plea to be understandingly made.[339] When the facts elicited during a guilty plea inquiry suggest a defense to the charge, COMA requires the military judge to insure the accused's understanding of the law surrounding that defense.[340] Military trial courts are also required to sift through the facts elicited during providency in search of indications that the accused may have lacked mental responsibility in committing an offense.[341] Thus, the military judge must tiptoe through the morass of requirements imposed by Care, RCM 910 and other case law to determine whether an accused's guilty plea is knowingly made.

The military appellate courts have not been as restrictive in examining whether a plea is voluntarily made as they have with the understanding requirement. Absent the obvious force and threat disqualifiers listed in RCM 910(d), the courts have not gone far afield to hold a guilty plea involuntary.[342] For example, COMA held that legal and other expenses incurred by an accused and efforts by the military to administratively discharge him, were not coercive of his guilty plea in United States v. Bedania.[343] Also, entry of a guilty plea by an accused to avoid the possibility of a death sentence was not sufficiently coercive to invalidate the plea in United States v. Partin.[344] In a recent COMA case, where the CA wrongfully influenced the availability of witnesses to testify on behalf of the accused, the court upheld the guilty pleas because there was no evidence indicating that the unlawful activity influenced the guilty pleas.[345] It there-

fore appears that a direct causal relationship between the coercive activity alleged and the guilty plea must be established by the defense in order to invalidate the plea as involuntary.

3. Military Court Involvement with Pretrial Agreements

In 1976, COMA held that guilty plea colloquies pursuant to United States v. Care must also include a detailed inquiry into any pretrial agreement involved in the case, in United States v. Green.[346] The Green decision required military trial courts to: (1) specifically inquire whether a plea bargain exists; (2) insure that the accused understands each condition of the pretrial agreement; (3) insure that the accused understands the sentence limitations imposed by the agreement; (4) strike down conditions in the pretrial agreement which are violative of the law, public policy or the judge's notions of fundamental fairness; (5) secure from the defense counsel and the prosecutor assurances that the written agreement encompasses all of the understandings of the parties and that the judge's interpretation of the meaning and effect of the agreement comports with theirs.[347] The court cautioned that when an accused was to be sentenced by military judge alone, vice court members, inquiry concerning the sentence limitations of a pretrial agreement should be delayed until after the announcement of sentence.[348] Failure to conduct a pretrial agreement inquiry pursuant to the mandate in Green was held to be a matter affecting the valid-

ity of the plea and these requirements were codified in RCM 910(f).[349] Since the effective date of Green, military appellate courts have held that the circumstances surrounding a pretrial agreement are relevant on the issue of whether a guilty plea is voluntarily and understandingly entered.[350] Shortly after Green was decided, COMA indicated that it would require strict scrutiny of all pretrial agreement terms in United States v. King.[351] However, in United States v. Crawford, COMA upheld a guilty plea when the inquiry did not address all provisions of the pretrial agreement as required by Green,[352] but it was clear from the record that the accused understood those provisions.

Military appellate courts have consistently held that a military judge should not be an arbiter in pretrial negotiations during the guilty plea inquiry.[353] However, the military court must inquire into every aspect of pretrial agreement[354] and is responsible for their enforcement and supervision in a manner which is fair to the accused.[355] While the military judge may not intervene in pretrial negotiations, he must nevertheless police pretrial agreements to ensure compliance with statutory and case law and public policy.[356] By court order, the military judge is empowered to modify pretrial agreements by implying terms, which must comport with the expressed intentions of the parties.[357]

The military courts have adamantly required the judge to inquire into and disclose the existence of a pretrial agreement or any understandings of the parties.[358] However, COMA upheld a guilty plea when the accused did not personally

assure the military judge that no such agreements existed, but his attorney did so in his presence in open court.[359] In general, the terms of the pretrial agreement must be sufficiently definite to withstand appellate scrutiny.[360] If the accused enters into a pretrial agreement with a mistaken impression of the effect of its terms, his guilty plea will be invalidated.[361] The military judge must consider the beliefs of the accused, not his attorney, as to the effect of terms.[362]

Military appellate courts have been unwilling to overturn cases involving lack of specific procedural compliance with Green when other facts adduced during the guilty plea inquiry indicated the accused made a knowing plea. In United States v. Cruz, COMA upheld a guilty plea although the military judge failed to obtain the assurances of both counsel that their understanding of the meaning and effect of the pretrial agreement was the same as his.[363] Similarly, COMA upheld a case involving the trial court's failure to obtain assurances from counsel that the written instrument constituted the entire pretrial agreement.[364] Thus, military appellate courts have used substance rather than form to test the procedural adequacy of guilty plea inquiries made pursuant to Green.[365]

The public policy review requirement of United States v. Green has engendered most of the case law regarding guilty pleas made pursuant to pretrial agreements. COMA has held that pretrial agreements which give the appearance that the

government has overreached or used a technicality to deprive an accused of the benefit of his bargain are against public policy.[366] Military appellate courts have upheld a variety of pretrial agreement provisions as being consistent with public policy: (1) terminating the pretrial agreement if the guilty plea is not entered prior to presentation of evidence on the merits;[367] (2) making the agreement dependent upon the accused's waiver of his right to a pretrial investigation;[368] (3) limiting punishment imposed only if the court awards a punitive discharge;[369] (4) requiring the accused to be sentenced by military judge alone vice court members;[370] (5) the accused waiving his right to require the testimony of a certain witness;[371] (6) the CA obligating himself to take certain administrative action subsequent to the trial;[372] (7) if a freely conceived defense product, foregoing litigation of motions contesting the legality of search and seizure and a lineup;[373] (8) waiving a motion for a change of venue.[374]

Many pretrial agreement provisions have also been struck down as against public policy by the military appellate courts: (1) waiving any issue of speedy trial or denial of due process;[375] (2) waiving certain appellate rights;[376] (3) a term invalidating the agreement if the accused committed further violations of the UCMJ between the date of trial and the date of the CA's action;[377] (4) requiring the accused to withdraw a motion alleging unlawful command influence by the CA.[378]

In United States v. Jones, COMA articulated the standard by which pretrial agreements should be evaluated to

determine whether they are contrary to public policy: "Only actions which may reasonably be construed as attempts to orchestrate the trial proceeding itself will be rebuffed."[379] COMA further indicated that terms such as waiver of motions by pretrial agreement would not violate public policy and vitiate a guilty plea as long as the record establishes that the agreement was a "freely conceived defense product."[380] Thus, while COMA has effectively relaxed the public policy standard, it continues to burden the military trial courts with the task of making further inquiry during the guilty plea hearing to determine whether certain clauses were freely conceived by the defense.

4. Determining the Factual Basis for the Guilty Plea in the Military Courts

As discussed earlier, there is no constitutional requirement to establish a factual basis for a guilty plea. In enacting Article 45, UCMJ, Congress nevertheless saw the need for a factual basis for each military guilty plea, and for the accused to make a judicial confession to the offense(s) charged.[381] These concerns have been defined by military case law and RCM 910.

During the military guilty plea colloquy, the factual basis for the plea must be established through personal inquiry of the accused by the military judge.[382] In United States v. Care, COMA required military trial courts to specifically warn the guilty pleading accused of his right to plead not guilty, whether or not he believes himself to be

guilty.[383] Care also required that the accused be informed that he should plead guilty only if he believes he is guilty; the record must include the accused's responses to the judge's inquiry into understanding of his pleading rights.[384] Independent evidence may be produced, but is not required, during the guilty plea inquiry to establish a factual basis for the plea.[385] If the requirements of Article 45, UCMJ, Rule 910(e), or military case law regarding the establishment of a factual basis during the guilty plea colloquy are not met, the military judge has considerable power to vacate the plea.[386]

A plea of guilty at a court-martial must be in accordance with the actual facts and responsive to the truth.[387] The guilty plea inquiry must elicit from the military accused the facts and circumstances surrounding the offense(s) charged in order to establish, not only that he believes himself to be guilty, but that he is, in fact, guilty.[388] The information elicited from the accused during the guilty plea colloquy must also be sufficiently accurate to support a conviction.[389] The military judge must either resolve discrepancies between the facts related by the accused and the offenses charged or must refuse the plea.[390] All of the parties to the trial, including the counsel for both sides, have the obligation to insure that the truth is placed on the record during the military guilty plea inquiry.[391]

Military appellate courts have also held that the factual basis elicited during the guilty plea inquiry must establish guilt as a matter of law.[392] Thus, during the

guilty plea inquiry where the accused admits only to facts indicating his innocence[393] or guilt of an offense other than that to which he pled,[394] his plea should be rejected. The facts admitted by the accused must support every element of the offense(s) to which he enters a guilty plea.[395] Thus, the military court is required to legally evaluate the facts presented by the accused during the guilty plea colloquy to determine whether each element is established.[396]

During the guilty plea inquiry, if the military accused makes statements inconsistent with his factual guilt, his plea must be rejected, even if the inconsistency was not tantamount to a denial of guilt.[397] Not only is there no factual basis for a guilty plea if facts inconsistent with the accused's guilt are elicited, but also if the inquiry reveals that the accused maintains <u>beliefs</u> which are inconsistent with his guilt.[398] When the accused makes an inconsistent statement during the guilty plea inquiry, the military judge must successfully resolve the inconsistency on the record to uphold the plea.[399] If a statement inconsistent with the accused's guilt is made by either the accused or witnesses during other stages of the trial, such as sentencing, the military judge must reopen the guilty plea inquiry and resolve the inconsistency or reject the plea.[400]

When the accused's responses during the guilty plea inquiry suggest a possible defense to the offense alleged, the military judge is required to clearly and concisely explain the defense to the accused and insure that it is

understood.[401] Through inquiry of the accused, the military judge is then required to extensively explore the facts and circumstances surrounding the possible defense.[402] The military judge must be alert to defenses which are not readily apparent during the guilty plea colloquy.[403] Further, in exploring the facts surrounding a potential defense, incorrect application of the law by the trial court will cause rejection of the guilty plea or appeal.[404] In addressing a potential defense during the guilty plea inquiry, the military judge must elicit substantial facts to properly evaluate its merit and not simply secure a legal conclusion by the accused.[405] The defense may be raised by facts adduced during the guilty plea colloquy, or at any time during the trial.[406] If, through inquiry of the accused, the military judge is unable to resolve a potential defense to a charge to which a plea of guilty has been entered, the plea must be rejected.[407]

During the guilty plea inquiry, the military accused is not required to describe the circumstances surrounding the offense from personal recollection. Instead, he may admit the factual basis of his guilty plea based on his understanding and belief of the evidence available to the government.[408] For example, in United States v. Olson, the accused's guilty plea was accepted after the military judge elicited facts during inquiry which indicated that the accused was fully aware of the evidence against him, understood it, discussed it with counsel, and believed it.[409]

In closing the guilty plea inquiry, the military judge

should make a specific finding that the accused has made a knowing, conscious waiver of his rights before accepting the plea, as required by United States v. Care.[410] This requirement is still another example of the procedural strait-jacket in which military courts have been placed by statute and case law in the conduct of guilty plea inquiries. While COMA has held that failure of the trial court to make the express closing finding is not error,[411] the Navy CMR has reversed a guilty plea for lack thereof.[412]

C. Military Trial Court Discretion and the Guilty Plea

Clearly, during courts-martial the military judge has broad discretion to reject guilty pleas. Rule 910 requires rejection of pleas of guilty to offenses for which the death penalty may be adjudged and in cases where the accused is not represented by counsel.[413] Because of the military judge's obligation to provide advice to the accused, explore the accused's understanding of that advice, and make in-depth inquiry into the plea's voluntary and understanding nature, the possibility that discretion will be exercised to reject a guilty plea is multiplied.[414] The military requirements that the accused admit to a factually accurate plea and for detailed inquiry into pretrial agreements have imparted nearly absolute discretion to the military judge in the rejection of guilty pleas.[415] As seen in the previous section of this paper, military appellate decisions have interpreted Article 45, UCMJ and RCM 910 in such a restrictive manner as to place a military judge in peril of reversal if there is a failure

to comply with procedure mandated by Care and Green and their progeny. This fear of reversal gives a military judge great incentive to reject a guilty plea at the slightest indication that the accused will have difficulty meeting one of the myriad of requirements for its acceptance.

COMA has not addressed the issue of discretion of the military judge to reject guilty pleas. Only the Army CMR has directed its attention to the matter. United States v. Scarborough, an early Army CMR decision, indicated that judicial discretion to reject guilty pleas was absolute.[416] In United States v. Johnson, the Army CMR held that the military judge has wide discretion in rejecting guilty pleas, but that such decisions were reviewable and could not be made arbitrarily.[417] Johnson was a case in which the accused was an alleged drug dealer whose guilty plea the military judge refused to accept because he failed to disclose his drug sources.[418] In United States v. Auman, the Army CMR again espoused the arbitrariness standard of review of court discretion to reject guilty pleas.[419] However, review of that record revealed no abuse of discretion.[420] Thus, Johnson is the only military appellate case to hold that a military judge abused discretion in rejecting a guilty plea and it involved a blatant abandonment of the judicial role. Since COMA has chosen to remain silent on the issue, it is apparent that discretion of military judges in rejecting guilty pleas will continue to be essentially unreviewable.

D. Guilty Plea Trend in the Military Courts

Although the trend in the federal courts is toward more activity by the trial court in the acceptance or rejection of guilty pleas, the military has become, by comparison, hyperactive. Despite the similarities between RCM 910 and Rule 11 discussed earlier, appellate court interpretations have resulted in very dissimilar guilty plea inquiries in the military and federal criminal systems.[421] The procedurally strict requirements for the acceptance of guilty pleas in the military courts have probably resulted in a higher percentage of appellate reversals for cases involving such pleas than in any other American jurisdiction.[422] General comparisons and commentary regarding the military and federal justice systems serve as a convenient illustration of the divergent paths possible under a single Constitution.

Federal case law has been much less restrictive in its interpretation of the advice requirements under Rule 11 than have the military cases under RCM 910. Federal cases have generally been upheld when the court substantially complied with the advice requirements concerning right to counsel, waiver of trial and punishment possible during the guilty plea colloquy.[423] Specific advice concerning the elements of the offenses to which a guilty plea is entered is not required at all in federal courts.[424] Military appellate decisions have been rigid in requiring literal compliance with the RCM 910 mandate that the accused admit every element.[425]

Guilty plea inquiries in the two systems differ significantly in the area of advice regarding maximum punishment.

In part, this may be attributable to the fact that the UCMJ embraces the concept of a single sentence for all offenses alleged while the federal courts pass a sentence for each individual offense. Thus, a punishment advice error in the military may potentially impact the validity of the entire sentence, while such an error in the federal system may only affect a single charge.

Another significant difference in the two systems is the military penchant for requiring the accused to demonstrate an understanding of the advice received during the guilty plea hearing. This requirement, coupled with required advice on the elements of the offenses to which a guilty plea is entered, places the military judge in the untenable position of providing scrupulously detailed advice and soliciting its demonstrable understanding to withstand scrutiny by appellate courts.

The military and federal systems have also approached the voluntariness and understanding requirements of RCM 910 and Rule 11 in widely divergent manners. Both court systems have been reluctant to invalidate guilty pleas for want of voluntariness unless a direct causal relationship between the coercive activity and the plea can be demonstrated.[426] However, what appellate courts consider to be an acceptable demonstration of the understanding nature of the guilty plea highlights the differences in the two systems. The federal courts have been willing to look to other circumstances considered during the guilty plea colloquy to uphold a plea, while the military courts have focused almost exclusively on

the statements of the accused.[427] Also, the federal courts have required specific indications of factors such as accused incompetence to invalidate a guilty plea; the military courts have seemingly scrutinized trial records for indications that such factors were overlooked by the trial court.[428] The expansive mandate of United States v. Care has required military judges to simultaneously be meticulous in conducting inquiry into specific areas to demonstrate the understanding nature of a guilty plea, while being innovatively expansive in the attempt to ferret out any slight possibility that the accused may have been misled in entering his plea.

Acceptance of guilty pleas in both the military and federal courts has been impacted by appellate interpretations of the plea bargain requirements of RCM 910 and Rule 11.[429] However, the degree of impact differs due to the more restrictive reading given to RCM 910 and because the plea bargaining process differs in the two systems.[430] The federal plea bargain encompasses an agreement reached between the defendant and the United States attorney while the military pretrial agreement must originate with the accused and is approved by the CA.[431] The law of both jurisdictions is intended to prevent unfairness in the plea bargaining process.[432] However, while the federal case law has focused on overall public interest, the military law is overwhelmingly slanted towards protecting the accused from government overreaching through the plea bargain.[433] The federal judge has the infrequently employed discretion to evaluate and reject a

plea bargain to insure justice for all parties, but lacks the enormous discretion and obligation imposed on the military judge to dissect each pretrial agreement in search of defects likely to invalidate the guilty plea.[434] The requirements of United States v. Green render virtually every pretrial agreement subject to the real possibility that the guilty plea will be rejected because, inter alia: (1) the accused is unable to demonstrate sufficient legal understanding of its many provisions; (2) the agreement does not encompass all of the understandings of the parties; (3) a provision in the agreement does not comport with the military judge's personal notions of public policy or fairness.[435] Accordingly, many more opportunities exist in the military justice system for reversal of a guilty plea due to a defective plea bargain than in the federal criminal system. Thus, the military accused is far less likely to be able to enjoy the benefits of a plea bargain than is his federal counterpart.

Perhaps the most marked difference between the guilty plea inquiries in the federal and military systems is found in the requirement that a factual basis be established for the plea. Although not constitutionally mandated, this requirement evolved to support the integrity of guilty pleas as a valid means of establishing criminal guilt.[436] The federal courts are far less exacting in their requirement for a factual basis in support of the guilty plea, allowing means other than the personal admissions of the defendant on the record to suffice.[437] In the military, an accused entering a guilty plea must personally admit facts on the record indi-

cating his truthful belief that he is guilty of each element of the offense(s) as a matter of law.[438] Further, during both the guilty plea colloquy and other portions of the trial, the military judge must constantly be alert for intimations of legal defenses and facts or beliefs inconsistent with factual and legal guilt.[439] Failure of a military judge to note or dispose of such defects in a guilty plea renders the case ripe for appellate reversal.[440]

Although some appellate case law exists in both the federal criminal system and the military justice system to the contrary, the trial courts in both systems have virtually unlimited discretion to reject guilty pleas and plea bargains.[441] The difference between the two systems lies primarily in the fact that the military judge has infinitely more incentive to exercise that discretion to reject guilty pleas than does his federal counterpart. Perhaps the traditional scrutiny of military guilty pleas evolved from the spirit of Congressional paternalism in enacting Article 45, UCMJ to avoid the appearance of impropriety in the military justice system.[442] Whether or not such concern is still viable 37 years after the enactment of the UCMJ, the protective nature of the military guilty plea inquiry has continued to grow increasingly restrictive through the promulgation of regulations and appellate court interpretation. Today, the military emphasis on factual guilt and procedural scrutiny of guilty pleas has, for all practical purposes, become the equivalent a trial on the merits. The guilty plea process has spawned

such a complex body of military law that it is ripe for analysis, reevaluation, and reform.

V. Analysis of Military Guilty Plea Inquiries

A. Framework for Analysis of Military Guilty Plea Inquiries

Thus far, this paper has traced the development of the guilty plea inquiry in the military against its constitutional background, making comparisons with the federal criminal system. In so doing, the author has implied that the military guilty plea inquiry transcends both its original purpose and constitutional requirements. The military guilty plea inquiry will be analyzed from the perspectives of: (1) impact of the guilty plea inquiry on the reasons an accused pleads guilty at a court-martial; (2) impact of the guilty plea inquiry on the accused's rights at a court-martial; (3) impact of the military guilty plea inquiry on the integrity of the military justice system.

1. Reasons an Accused Pleads Guilty at a Court-martial

Once charges against a military accused have been referred to a court-martial, many factors may impact on his pleading decision. Subtle pressure to plead guilty is often applied in a manner which does not rise to the level of legal coercion. The effect of such pressure actually depends on the background and personality of the individual accused. Many motivating factors have been suggested as possible reasons for an accused to plead guilty at a criminal trial: (1) the threatening nature of apprehension and formal charges may jar an admission of guilt; (2) a wish to formally atone for a

breach of law; (3) a desire to quickly begin criminal or substance abuse rehabilitation; (4) a desire to avoid the expense of a trial on the merits; (5) a wish to avoid the emotional trauma of a fully litigated trial; (6) a hope that expediency of judicial administration in a setting free from the publicity which often attends a trial on the merits will invite leniency in sentencing; (7) a personal desire to reduce exposure of the accused and his family to the public eye; (8) conditions of pretrial confinement; (9) pressure from family, friends or attorney; (10) due to ignorance, deception or delusion, the accused erroneously concludes that he is legally guilty; (11) self-destructive inclinations; (12) desire to avoid a possible finding of not guilty by reason of insanity which could lead to indefinite psychiatric confinement; (13) desire to expedite proceedings because of feelings of hopelessness, powerlessness, or despair when faced with the power of the government; (14) a desire to protect family or friends from prosecution; (15) a fear that fuller inquiry at trial may disclose facts which would increase the sentence or result in additional prosecution; (16) potentially overwhelming nature of the government evidence; (17) great disparity in punishment between conviction by trial and conviction by plea due to pretrial agreement.[443] Many of these suggested factors apply whether or not an accused in factually guilty of the charge(s).[444] All of the factors are relevant to an evaluation of the military guilty plea inquiry as it currently exists.

2. Impact of Guilty Plea Inquiry on the Accused's Rights at Court-martial

It has been suggested that the primary concern of the guilty plea inquiry process is to protect fundamental rights of the accused.[445] Evaluation of the military guilty plea inquiry should thus address its impact on the accused's rights at a court-martial. During the inquiry, the accused is advised of and must understand that an accepted guilty plea waives his rights to be tried by a court-martial, to confront and cross-examine witnesses against him, and his right against self-incrimination.[446] In general, an accepted plea of guilty in the military waives appellate review of all requirements for legal guilt, including all constitutional and procedural safeguards designed to assure a full and fair judicial proceeding on the merits.[447] Specifically, military appellate courts have held that a guilty plea waives appellate review of: (1) minor defects in the drafted charges;[448] (2) nonjursidictional defects in the member composition of the court during findings or the merits;[449] (3) defective staff judge advocate advice to the CA regarding the pretrial investigation;[450] (4) defective pretrial investigation;[451] (5) lack of defense counsel at pretrial investigation;[452] (6) ineffective assistance of counsel at pretrial investigation;[453] (7) Sixth Amendment violations;[454] (8) Fourth Amendment violations;[455]

On the other hand, military appellate courts have specifically held that a valid guilty plea does not waive the appellate review of: (1) jurisdictional defects;[456] (2) fatal

defects in the drafted charges;[457] (3) status as a conscientious objector;[458] (4) denial of requested counsel;[459] (5) lack of verbatim trial record;[460] (6) defective court composition during sentencing;[461] (7) statute of limitations;[462] (8) admissibility of evidence on sentencing;[463] (9) right to a speedy trial;[464] (10) challenge of military judge;[465] (11) trial on unsworn charges.[466] Thus, an accepted guilty plea waives some, but not all, areas of appellate review. It is important to weigh the effect of an acceptable guilty plea in terms of its actual impact on the rights of the military accused.

3. Impact of the Military Guilty Plea Inquiry on the Integrity of the Military Justice System

In enacting the UCMJ, Congress intended to balance the security and order necessary to achieve maximum military performance against the value and integrity of the individual necessary to achieve maximum justice.[467] As with most areas of the law, the military justice statutes, the MCM, and military case law have been in a constant state of change to maintain that balance. The United States Supreme Court has recognized the special needs of the military by exempting the military justice system from providing such rights as a grand jury indictment and petit jury trial.[468] On the other hand, the military law which has evolved regarding the guilty plea inquiry demonstrates the lengths to which military courts and Congress have gone to protect the individual. An evaluation of the military guilty plea inquiry must therefore be made

with the integrity of the military justice system in mind.

B. Analysis of Military Guilty Pleas

1. Potential Effect of Detailed Guilty Plea Inquiry at Court-martial

Many legal commentators have pointed out the drawbacks of detailed guilty plea inquiries. Such inquiries in courts-martial have become enormously complicated; the primary detriment has been discussed in terms of cost of the additional burden placed on the military judiciary.[469] Detailed guilty plea inquiries in a criminal justice system drive systemic costs up in three ways: (1) expense of the lengthy court time required to conduct the inquiry; (2) expense required for trials on the merits of accused who would have been convicted pursuant to their guilty pleas, had the plea not been rejected; (3) expense of the increased appellate litigation resulting from detailed inquiry.[470] The additional time spent by a military judge with the accused during the guilty plea inquiry translates to extra transcription costs due to the record required by RCM 910(2). Further, additional judges, support staff, and court space are required by the lengthier guilty plea proceedings and additional trials.[471] Finally, the reversal of more cases because of the demanding guilty plea inquiry in the military drives up the expense of appellate counsel, appellate support personnel, appellate transcripts, and can also result in additional costs due to the necessity of repleading or resentencing if the case is remanded.[472]

Conversely, some commentators argue that substantial

benefits accrue from a protective guilty plea inquiry such as that found in the military: (1) the possibility of convicting a factually innocent accused may be reduced; (2) the accused may be spared improper or ignorant surrender of his rights; (3) the integrity of courts may be enhanced due to reduced allegations of improper convictions; (4) public respect may be increased for the quality of justice in the system; (5) society may profit from the productivity of an accused who would have been found guilty but for his rejected guilty plea; (6) a legally innocent accused whose guilty plea was rejected will have a better opportunity for employment without a criminal record; (7) an accused may be less likely to commit future crimes if not alienated by a prior wrongful conviction.[473]

These arguments presuppose that an intensive guilty plea inquiry will result in fewer convictions and that no alternative means exist to preserve an accused's rights at trial. No statistical data exists to support the assertion that more rejected guilty pleas will necessarily result in fewer convictions. Most of the reasons motivating a guilty plea previously discussed are not impacted by a detailed guilty plea inquiry, except perhaps an erroneous conclusion of legal guilt.[474] In fact, almost all of the listed reasons for guilty pleas may provide motivation to plead guilty whether or not the accused is factually guilty.[475] This may especially be true if the accused is faced with overwhelmingly convincing evidence in the hands of the government prose-

cutor. As discussed earlier, many guilty pleas in the military are rejected because of the mere possibility that a legal defense exists. The accused, with the assistance of a competent defense counsel, is in a far better position than the court to weigh potential legal defenses in comparison with the subjective strength of the factors motivating the guilty plea.

There are also no convincing arguments that the detailed military guilty plea inquiry alone protects the accused from improper waiver of his fundamental rights at trial. As previously discussed, a guilty plea in the military waives several potential appellate issues.[476] Most of the issues waived relate to the accused's pretrial investigation and to issues of legal guilt.[477] However, the impact of such waiver is softened by the MCM requirement that such issues must be raised by motion prior to entry of the plea.[478] For example, motions to suppress evidence based on alleged Fourth Amendment violations must now be brought prior to the plea, pursuant to Military Rules of Evidence, Rule 311, which was enacted in 1980 as a departure from prior military practice.[479] Litigation of such issues prior to arraignment takes much of the potential sting from their waiver once the guilty plea is entered because the accused and his counsel know the court's disposition on a legal issue when pleas are entered. If the motion is granted, then the accused has the benefit of legal protections which may be totally dispositive of the case. Further, as discussed earlier, under military case law many important appellate issues not related to the merits of

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the case survive a guilty plea. Thus, the detailed review of the accused's legal understanding of his rights during the guilty plea colloquy may not necessarily result in increased protection to him.

Arguments can be made that the military guilty plea inquiry does not necessarily enhance the integrity of the military justice system. The military law which has evolved in this area is complicated for lawyers and military judges, and is virtually incomprehensible to lay persons. Raising a potential legal issue from the information provided by the accused during a lengthy guilty plea inquiry and rejecting his plea is legal "mumbo jumbo" to the average person. What is touted as enhancing integrity of the military justice system is often simply viewed as part of the dilatory game played by the legal profession. To suggest that society may view negatively a system that occasionally convicts a factually innocent accused who pleads guilty overlooks the fact that mistakes are also made during trials on the merits in criminal cases. Public confidence in the fairness of the military justice system is not necessarily fostered by an overzealous guilty plea inquiry, and may be enhanced by reforms to the plea inquiry.

2. Military Court Guilty Plea Inquiries Transcend Constitutional Requirements

The only constitutionally mandated test for acceptance of a guilty plea is that it was entered voluntarily and
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understandingly. The military courts will not accept a

guilty plea unless: (1) the accused truly believes he is guilty and acknowledges guilt of the elements of the offense; (2) the accused does not present evidence inconsistent with his plea; (3) the facts relevant to the plea and pretrial agreement establish a factual basis for the plea.[482] Thus, under military law, there is no possibility that a guilty plea will be accepted when the accused protests his innocence as occurred in North Carolina v. Alford.[483] Judge Ferguson of COMA in United States v. Louebs discussed the paternalistic attitude prevailing in military courts:

> North Carolina v. Alford did not establish the law of this court, Care did, and I submit that the military rule for the acceptance of a guilty plea, set forth in Care, is stricter than that provided in Rule 11 of the Federal Rules of Criminal Procedure. This is not the first time we have had occasion to apply a broader test in military cases than that required in the federal civilian courts.
>
> The stricter rule in military cases is a salutary one. Many of those in the military are now serving by reason of compulsory laws; many are away from home, family, and friends for the first time; and many are of an age making them responsible in some jurisdictions only as juveniles. These and other similar reasons make it desirable that the elicitation of the facts reflecting that the accused is in fact guilty of the offenses to which he is so pleading be proved under a more stringent rule.[484]

Various legal authors have suggested that one of the primary concerns of a criminal justice system should be to ensure that factually innocent defendants are not convicted.[485] The federal courts have recognized this concern in requiring a factual basis to be established in support of a

guilty plea.[486] However, the requirement that a factual basis be established in addition to constitutional requirements has been carried to the extreme in military courts. The military requirement innures to the benefit of the factually or legally innocent accused whose guilty plea is rejected and who is later found innocent on the merits of his case. However, it is of absolutely no benefit to the accused with an arguable legal defense or who is factually innocent and is later nevertheless convicted on the merits of his case after his guilty plea is rejected. The latter type of accused may suffer sentence disparity caused by loss of the benefits of a plea bargain or by loss of the sentencing benefit which accrues from the attitude that a guilty plea is indicative of remorse and is thus evidence of rehabilitative potential.

Other analyses of the role of the guilty plea focus on the function of pleas rather than the accused's ideas regarding his guilt or innocence.[487] The factual basis for a guilty plea is not considered to be in issue. Instead, emphasis is placed on the adequacy of the accused's waiver of his right to a trial on the merits.[488] This functional view of guilty pleas is far more realistic than suggestions that great efforts should be expended by trial courts to insure that a factual basis be established through judicial confession. It is consistent with most of the reasons which motivate an accused to plead guilty.[489] Further, this emphasis is totally consistent with an analysis of the guilty plea inquiry in terms of waiver of the accused's rights.[490] If the record of

the guilty plea inquiry is sufficient to establish that the plea was voluntarily and understandingly entered, then it is considered adequate. The careful efforts by military courts to scrutinize a guilty plea for its voluntary and understanding nature should be made without requiring a confessed factual basis. This approach simultaneously fosters the integrity of the military justice system because the accused will no longer have overwhelming incentive to lie to the court concerning factual basis to preserve the validity of his guilty plea. As has been discussed, many factors other than factual guilt may motivate his plea. This emphasis would also alleviate the ethical dilemma created when an accused, whether guilty or not, informs his counsel that, to secure some advantage, he desires to lie to the court to assure acceptance of his guilty plea. A shift from the protective philosophy of the military courts allowing guilty pleas only in cases of factual guilt to the functional pleading outlook would require substantial changes in military law.

3. Military Courts Force an Unconstitutional Dilemma on the Accused

For the military accused who is not willing to acknowledge his guilt or believes himself to be innocent but is faced with overwhelming government evidence, a dilemma of possible constitutional dimensions is created. Such an accused may essentially be deprived of the opportunity to seek a pretrial agreement with the CA and the real possibility of a less severe sentence. The accused's honesty during the guilty plea colloquy would result in certain rejection of the

plea because of the military requirement for its factual accuracy. Thus, the accused must realistically choose between deceiving the court during the guilty plea inquiry and a potentially harsher sentence than might be awarded to a similarly situated defendant unburdened by belief of innocence.

As discussed earlier in this paper, the military accused is prohibited from pleading guilty to an offense punishable by death or if unrepresented by a defense counsel.[491] In United States v. Matthews, COMA held that Congress had not acted arbitrarily in banning guilty pleas to death penalty offenses under Article 45, UCMJ and that the accused had no constitutional right to enter such a plea.[492] By implication, the United States Supreme Court approved a similar restriction by North Carolina in the Alford decision.[493] Military and civilian criminal courts have also remained steadfast in their refusal to recognize a general constitutional right to plead guilty.[494] However, the Supreme Court in Alford did not foreclose the possibility that it might require a court to accept a guilty plea from an accused thrust on the horns of the above-described dilemma. Further, the Alford court recognized the judge's discretion to refuse guilty pleas under Rule 11, but refused to delineate the scope of that discretion.[495] By implication, the Court left open the possibility that it may give definition to the scope of judicial discretion to refuse guilty pleas in an appropriate case.

Whether the dilemma thrust upon the accused who wishes

to plead guilty despite protestations of innocence violates due process has never been directly addressed by the military appellate courts. As previously discussed, the Army CMR has suggested that the military judge does not have absolute discretion to refuse a guilty plea.[496] However, the issue of whether the accused's right to due process requires military court acceptance of a guilty plea from an accused who had additionally secured a beneficial pretrial agreement, but could not admit guilt requires further consideration.

Due process analysis of the military requirement for factually accurate guilty pleas should involve a three part evaluation: (1) the requirement is assessed to determine whether it impairs a constitutional right; if not, the inquiry need go no further; (2) if a constitutional right is impaired, the requirement is then assessed to determine if it furthers a legitimate government interest; if not, it is unconstitutional; (3) even if a legitimate, substantial government interest in the requirement can be demonstrated, it is still unconstitutional if a less restrictive means to achieve it can be demonstrated.[497]

While plea bargaining has not explicitly been elevated to the level of a constitutional right, it has emphatically been recognized by the Supreme Court as being advantageous to defendants because it allows them to avoid the maximum punishment they could have received if they exercised their rights to trial.[498] Few will argue with the proposition that defendants who insist on trial suffer substantially more severe punishment than those who plead guilty.[499] In acknow-

ledging the constitutional legitimacy of plea bargaining, the Supreme Court has impliedly recognized that it does trench on constitutional rights to trial.[500] If plea bargaining is a constitutionally recognized means for the waiver of the accused's rights to trial, then the military factual accuracy requirement for guilty pleas prohibits the accused who maintains innocence from utilizing one of the alternatives recognized by the Supreme Court for disposal of his case. The Supreme Court's endorsement of plea bargaining has effectively raised it to the status of a quasi-constitutional right at trial. Such a right should inure to the benefit of all persons accused of crime, including those who refuse to admit their guilt. Accordingly, it is submitted that the military factual accuracy requirement for guilty pleas does effectively impair a quasi-constitutional right and arguably satisfies the first part of the proposed due process evaluation.

Assuming that the military factual accuracy requirement for guilty pleas impairs a constitutionally recognized right, it may still survive scrutiny if it serves a legitimate government interest under the second part of the due process evaluation. The government interest in requiring a detailed factually accurate guilty plea inquiry could be argued to be of assistance to the military judge in determining whether the plea meets the voluntary and understanding constitutional requirements. However, as demonstrated by the law evolving in the federal courts, this interest can be met by a far less detailed inquiry which focuses on the decision to plead

guilty rather than the true factual guilt of the accused. Another government interest possible in requiring a factually accurate guilty plea is to make appellate review of the military guilty plea less complicated. Again, as demonstrated by the federal courts, the present day requirement for a full record of the military guilty plea colloquy should meet that concern.[501] As discussed earlier, the most frequently articulated government interest is the protection of the rights of an accused who is motivated to plead guilty through ignorance of his legal or factual innocence. Of all potential factors motivating an accused to plead guilty, this is the only factor which could possibly be enhanced by a detailed factually accurate guilty plea inquiry such as that found in the military.[502] An accused who is enlightened as to his potential innocence during the guilty plea colloquy may, if given a choice, still choose to plead guilty because motivated by other factors such as overwhelming government evidence against him. Further, if his guilty plea is rejected and he is forced to defend himself on the merits, a guilty finding may nevertheless result.

The detailed factual accuracy requirement for guilty pleas does not necessarily enhance the integrity of the military justice system. The federal system has maintained integrity without requiring a factually accurate guilty plea to be established from the accused's own mouth. Although Rule 11 requires that a factual basis be established for acceptance of a guilty plea, Alford recognized that such a requirement can be met by adducing facts from sources other

than the accused.[503] The military justice system has been completely revamped since Article 45, UCMJ, was enacted in 1950 to require a factually accurate guilty plea. Military appellate courts are no longer the only bastion of protection for the accused's rights because all SPCM's and GCM's are now presided over by legally trained military judges.[504] Further, an accused tried by SPCM or GCM may now be represented by a civilian counsel of his own choosing and/or a legally trained military lawyer of his own choosing or detailed to represent him.[505] The atmosphere in the military is no longer one which should evoke the parens patriae attitude toward the accused expressed by COMA's Judge Ferguson.[506] With the advent of the all-volunteer military force, no accused is subjected to military jurisdiction against his will. Further, the military accused would most certainly be tried as an adult in other criminal systems for similar offenses, contrary to Judge Ferguson's concerns that many of them would be processed in civilian juvenile court systems, but for their active duty military status.[507] Finally, RCM 910 is in many respects patterned after Rule 11.[508] The federal court system has evolved a workable, rational system for determining the acceptability of guilty pleas. There is no government interest in protecting the military accused which is not shared by the federal system, which has found a significantly different method of meeting such interests. Thus, there is no substantial government interest in requiring a factually accurate admission of guilt from an accused prior to acceptance of his

guilty plea.

Even if a substantial government interest in requiring factually accurate support of military guilty pleas were conceded, due process evaluation would render the requirement unconstitutional if there exists a less restrictive means to achieve the interest. In North Carolina v. Alford, the Court recognized the fact that a jurisdiction could legitimately confer by statute or case law an accused's rights to have his guilty plea accepted by a trial court.[509] However, neither Congress nor COMA has done so. Thus, it is prudent to explore less restrictive alternative means to protect the military accused's rights at trial when pleading guilty. These alternatives could alleviate the due process dilemma created when an accused who cannot admit guilt desires the potential benefits of a guilty plea.

C. Alternatives Available to Protect the Accused Pleading Guilty in the Military

1. Increased Defense Counsel Role in the Guilty Plea Process

As discussed earlier, the Supreme Court has repeatedly considered presence of a competent defense counsel when determining whether a guilty plea met the Constitutional voluntary and understanding standard.[510] With the abundant availability of defense counsel to the military accused, the competent advice of an attorney should alleviate many of the concerns which have motivated Congress and the military appellate courts in the evolution of the guilty plea inquiry. The rigid requirements that have been laid on the

military judge during the guilty plea colloquy could be relaxed in cases involving defense counsel, similar to the approach taken by federal courts.[511] Similarly, the meticulous and time consuming inquiry required to establish the voluntary and understanding nature of military guilty pleas could be considerably shortened by a dependence on defense counsel to competently advise the client.[512] There is no necessity for the military court to reexamine the many aspects of pretrial agreements if the defense counsel has already adequately explained them to his client.[513]

Assuming the constitutionality of the military requirement for a factually accurate basis for an accused's guilty plea, the role of the defense counsel in that area could be expanded enormously. The military judge's exacting inquiry into the facts of the alleged offense could be reduced to a simple inquiry as to whether the legal and factual guilt of the accused had been discussed in detail with his attorney.[514] Alternatively, if the factual basis for a military guilty plea should no longer be required to be established through the accused's own testimony, then factual basis could be established through independent means such as a copy of the pretrial investigation, as is current federal practice.[515] With the extremely liberal discovery available to the defense in military cases, a defense counsel is in an excellent position to obtain all facts necessary to play this proposed expanded role in the entry of guilty pleas.[516] With litigation of motions prior to entry of a plea, the defense counsel's advice to his client concerning legal guilt could

still be monitored by the military trial court to some degree.[517] Further, the military accused would still have the protection of appellate review of issues not waived by the guilty plea.[518]

Increased reliance on the defense counsel to establish the voluntary and understanding nature of the guilty plea in military courts would have other advantages. Through personal interraction, a defense counsel has the confidence of his client and a much greater capacity to insure that a guilty plea is constitutional and that the client's rights are protected. The integrity of the military justice system would be enhanced because the accused would have less incentive to deceive the court during the guilty plea colloquy to obtain the benefits of his pretrial agreement. Further, the defense counsel would have less incentive to "coach" his client to help the accused avoid the many responses which could lead to rejection of his plea.

The obvious drawback to increased reliance on the defense counsel to establish the constitutionality of a plea is that there are not adequate means to review his performance to determine whether he has competently advised his client regarding a guilty plea. The trial court is not privy to private consultations between the accused and his lawyer, plea bargaining negotiations, and other counsel activity hidden from the public eye. Further, as previously discussed, the courts have been reluctant to find incompetence on the part of defense attorneys.[519] Conceivably, an incompetent,

lazy, or dishonest lawyer could do extreme disservice to his client. However, it is submitted that the current status of military law requiring detailed inquiry by the court into the validity of the plea provides no better assurance of defense counsel quality. The counsel can presently manipulate and coach legally unsophisticated clients into submission of a guilty plea which can survive trial court scrutiny through false or misleading responses to the court's inquiry. A possible solution would be to require a defense counsel to provide the military judge with an affidavit countersigned by the accused detailing the advice provided to the accused and activity undertaken on behalf of the accused prior to entry of a guilty plea. Thus, both trial and appellate courts would have a basis for reviewing defense counsel's competence and satisfaction of his new, greater role in assuring the constitutional validity of the plea.

2. Reduced Judicial Supervision of Military Pretrial Agreements

Because a large number of military cases involve pretrial agreements,[520] the requirements for detailed scrutiny thereof during the guilty plea inquiry involve significant expenditures of judicial resources.[521] When receiving guilty pleas involving plea bargains, the military judge must endeavor to safeguard both the accused's interests and the government's interest in efficiently disposing of cases.[522] In attempting to achieve that balance while requiring detailed policing of military pretrial agreements, COMA noted several reasons in United States v. Green for imposing com-

prehensive inquiry requirements on the military judge: (1) to enhance public confidence in the plea bargaining process; (2) to assist appellate tribunals in exposing any secret understandings between the parties; (3) to clarify on the record any ambiguities lurking within the agreement; (4) to assist in the determination that a plea is voluntarily and understandingly made; (5) to insure that the terms of the agreement comply with the law and adhere to basic notions of fundamental fairness.[523] However, it is doubtful that COMA anticipated the increasingly restrictive nature of Green's progeny and the attendant stress placed upon military judges accepting guilty pleas to avoid appellate reversal.[524]

An alternative to comprehensive on the record examination of each provision of a pretrial agreement by the military judge during the guilty plea colloquy is for him to simply examine the pretrial agreement prior to acceptance of the plea and announce his interpretation of the sentencing provisions and any ambiguous clauses included. The peculiar nature of military plea bargaining which requires that a plea bargaining offer originate with the accused and his counsel and be reduced to final written form is particularly conducive to such a modified trial court review.[525] Should the accused or his counsel disagree with the military judge's interpretation, the accused could be afforded an opportunity to withdraw from the agreement and plead not guilty or to attempt to negotiate a modification to the plea bargain which comports with his understanding of its terms. Such an approach would

create a record sufficient to accommodate meaningful appellate review of the pretrial agreement while avoiding laborious inquiry into standard clauses, the meaning of which should be apparent to any accused assisted by competent counsel.

The proposed reduction in military court scrutiny would satisfy the concerns expressed by COMA in Green. There would be no significant loss of public confidence in the military plea bargaining process. The inherent inequality in bargaining positions between the CA and the accused have been addressed by a host of regulations. For example, the MCM prohibits the unreasonable multiplication of charges[526] which may induce a pretrial agreement offer from the defense and referral of charges when insufficient admissible evidence is available to convict at trial.[527] Questions regarding any sub rosa agreements between the parties can be resolved by indulging in a presumption that the written pretrial agreement contains all agreements of the parties. Such presumption would place the accused in the position of affirmatively bringing any unwritten agreements to the attention of the court at the trial level or risk waiving the issue on appeal. Thus, these matters can be placed before the court without the detailed pro forma scrutiny currently practiced.

The military judge's inquiry into the pretrial agreement need go no further than the Supreme Court's 1984 mandate in Mabry v. Johnson.[528] There, the Court refused to dwell on the constitutional significance of the plea bargain itself, but held that when the government breaches its promise regarding

an executed plea agreement or the accused is misled regarding its consequences, then the guilty plea may be challenged under the due process clause.[529] The accused's rights would be adequately protected by the proposed reduced guilty plea inquiry because a claim that he was misled would be addressed by the military judge during discussion of ambiguous provisions. A breached promise regarding an executed pretrial agreement can be addressed as it is currently, at the appellate level.

Finally, limited plea bargain inquiry and examination of the four corners of the pretrial agreement are sufficient for the military judge to satisfy himself that the agreement complies with the law and his notions of fundamental fairness. Should the pretrial agreement not satisfy the military judge in that regard, the accused can again withdraw from it or negotiate a satisfactory modification. The proposed reduction in military court scrutiny of pretrial agreements avoids the current wasteful and necessary practice of sentence by sentence dissection through verbal intercourse with the accused, while preserving the protections currently afforded him.

D. Military Court Guilty Plea Inquiry as a Protective Forum

The current military guilty plea inquiry is justified as being protective of the accused's rights; the effect of the inquiry on those rights must be evaluated against the background of reasons that an accused may decide to plead guilty.[530] As discussed earlier, a military accused may be

faced with a host of overriding concerns which may compel him to enter a plea of guilty. The military accused is placed in the unique position of testifying in favor of his own conviction during the guilty plea colloquy in order to successfully plead guilty and meet those concerns. Because of the nature of military guilty pleas, such testimony must not only provide detailed replies to court inquiry, but must be factually accurate for the plea to be accepted.

The detailed advice to the military accused required during the guilty plea inquiry often provides no protection for him, depending on his motivation to plead guilty. For example, accurate court advice regarding the maximum sentence possible for the offense charged affords no protection to the accused benefitted by a pretrial agreement[531] or one facing a SPCM with a jurisdictional sentencing limitation of confinement for six months, much less than the potential maximum for most military felonies. Advice regarding the elements of an offense, even if truly comprehended by the accused, will have no impact when the plea is motivated by considerations other than belief in legal or factual guilt. Further, an accused who is truly motivated to plead guilty is unlikely to respond in any manner other than to indicate his understanding of court advice.

The detailed guilty plea colloquy does not always effectively determine the voluntary and understanding nature of the plea. In fact, judges' efforts to determine understanding of a plea have resulted in reversal based on miscommunication

which inadvertently coerced the plea.[532] The specific information Care required to be elicited by military courts in support of an understanding plea encourages contrivance on the part of an accused motivated to convince the court to accept his plea.[533] As discussed earlier, absent some specific evidence of plea coercion, military appellate courts have only infrequently found guilty pleas to be involuntary.[534]

The plea inquiry into pretrial agreements also provides no practical protection to the accused. The meticulous scrutiny of pretrial agreement provisions is not likely to evoke an indication of non-understanding by an accused who wishes to convince the court to accept his guilty plea. The public policy scrutiny of pretrial agreements does not always inure to the accused's benefit because it may result in judicial disapproval of an agreement which is strongly supported by the accused. This concern has been somewhat alleviated by the recent trend of military appellate courts of finding provisions not violative of public policy when a "freely conceived defense product."[535] An accused motivated to plead guilty can overcome a public policy issue during the guilty plea colloquy simply by espousing a clause as being conceived by him. The guilty plea inquiry is also not a good forum for discovering hidden agreements between the parties. By their very nature, such agreements provide the accused with incentive to conceal them from the court.

Finally, as previously discussed, the military requirement for factually accurate guilt provides no practical protections to an accused. Evaluation of the facts of a case to

determine factual and/or legal guilt develops largely as an alternative-weighing strategy process. The accused, assisted by counsel, must carefully weigh the facts and the likelihood of a successful defense on the merits against the benefits obtainable through a guilty plea. Once the accused has determined that the benefits of pleading guilty outweigh all other considerations, it is unlikely that he will be deterred from pleading guilty by an in-depth guilty plea colloquy.

From the foregoing discussion, it is apparent that the military guilty plea inquiry motivates an accused who has chosen to plea guilty to mislead and falsify during virtually all phases of the hearing. The Supreme Court has held that such misrepresentations during a federal guilty plea inquiry do not necessarily foreclose later claims that a plea was not knowingly and voluntarily entered, even though such inquiry was intended to flush out and resolve such issues.[536] Regardless of the detail in which the military judge conducts the guilty plea colloquy, he cannot protect against a later claim by an accused that his plea a was coerced, even if such coercion was specifically disavowed at trial. Thus, not only does the military guilty plea inquiry fail to provide intended protection to the accused, but it also fosters deception by him and fails to finally resolve the potential constitutional issues in any plea. As a practical matter, the military guilty plea does not effectively serve the interests of the accused or the government.

E. Necessity of Plea Bargaining in the Military

The difficulties with plea bargaining and the attendant problems which have evolved in the law of military guilty plea inquiries could quite simply be resolved by abolishing guilty pleas. The Supreme Court has often reiterated its position that an accused has no constitutional right to plead guilty in a criminal trial.[537] The military has already abolished guilty pleas to offenses which carry a possible death penalty.[538] Thus, there is no constitutional reason why guilty pleas could not be totally prohibited in the military. Of course, such a move would also eliminate all pretrial agreements. It is thus relevant to examine the necessity for plea bargaining.

As discussed earlier, many legal scholars support the abolition of plea bargaining, raising two separate arguments: (1) plea bargaining coerces possibly innocent defendants into waiver of important constitutional rights, including the right to trial by jury; (2) it results in inappropriately lenient sentences because prosecutors and judges make dispositional concessions to defendants based strictly on administrative expediency.[539] Thus, plea bargaining is attacked from the standpoint of due process and because administratively expedient sentences cannot be justified under a deterrence, societal protection, or rehabilitation rationale or any other theory of penal sanction.

On the other hand, plea bargains are supported when they occur in what is termed an "appropriate system". The

results of negotiated trials in an appropriate system will so closely approximate those at a contested trial that the difference involves no inherent illegitimacy.[540] The previously presented arguments against plea bargaining are not applicable in an appropriate system which meets the following basic requirements: (1) the accused must always have the opportunity for a jury trial to resolve both the merits and sentence in his case; (2) the defendant must be at all times represented by competent counsel during plea bargain negotiations; (3) the defense and the prosecution must both have equal access to evidence bearing on the outcome of the case should it go to trial; (4) all parties should have the resources to take the case to trial should pretrial negotiations fail.[541] In such an appropriate system, the plea bargaining system is perhaps no less rational than the trial system upon which it is based.

The military justice system closely approximates the appropriate system just described. An enlisted military accused facing trial by GCM or SPCM has the option of having both the merits and sentence in his case decided by an impartial panel of members, at least one-third of whom are also enlisted.[542] Such an accused has the right to be represented by a civilian counsel of his own choice or a military attorney of his choosing, if reasonably available, in addition to the military defense counsel that is detailed to his case.[543] Such counsel must be qualified members of the bar of a state or federal court and are subject to the professional supervision and discipline of the Judge Advocate General of the

armed force with cognizance over the case.[544] The defense counsel chosen by or appointed for the accused is expected to represent his client at all times, including during negotiation of a pretrial agreement.[545] Discovery rules in the military not only require that both the prosecution and the defense have equal access to all available evidence, but the parties have the affirmative obligation to disclose certain types of evidence to the opposing side.[546] These liberal rules apply both with respect to evidence offered on the merits and during the sentencing phase of the bifurcated military trial.[547] Each party to a military trial has equal access to witnesses, including experts to be provided at government expense if their testimony is deemed to be relevant and necessary.[548]

Should pretrial agreement negotiations fail in the military, the parties at least have equal resources to go forward with the case at trial. The government absorbs the expense of both the prosecution and defense (assuming the accused employs a military attorney) at both the trial and appellate levels.[549] The numbers of prosecutors, defense counsels, judges and support resources available in any of the services are a function of supply and demand, as limited by the budgeting restraints set by Congress, the Department of Defense, and intra-service funding priorities. Thus, like most criminal jurisdictions, the availability of resources to try cases on the merits is somewhat subject to the prevailing governmental budgetary climate. However, this is perhaps less

true in the military because pretrial agreement decisions are made by the CA, who is not in the same chain of command and not subject to the budgeting resource considerations of the service's legal community. Thus, if CA's consistently refuse to negotiate pretrial agreements, causing a substantial increase in demand for legal resources from the service's legal community, governmental budget authorities must either provide the resources necessary to try cases or face the prospect of losing cases on speedy trial and other procedural grounds. Because of the critical emphasis placed on discipline and combat readiness in the armed forces, it is unthinkable that budget authorities would not positively respond to such a crisis.

The military justice system therefore closely approximates an appropriate system in which the two most common arguments against plea bargaining do not apply. In addition to being less objectionable than in other systems, plea bargaining in the military clearly conserves judicial resources, a rationale which prompted the United States Supreme Court to give the practice its unqualified endorsement in Santobello v. New York.[550] Therefore, it is not the military plea bargaining process itself but the method for receiving the resultant guilty plea which needs reform.

VI. Proposed Improvements in Guilty Plea Evaluation in the Military Courts

A. Revisions to Article 45, UCMJ

As discussed earlier, many of the concerns which prompted Congress to make Article 45, UCMJ, protective have now

dissipated.[551] Changes to the military justice system have eliminated many concerns about the integrity of military justice and the rights of accused unrepresented by qualified counsel in many serious criminal cases.

Although some steps have already been taken in that direction, revisions to make military guilty plea procedures more like federal procedures are needed. Appendix E presents a proposed revision to change Article 45, UCMJ, in three important respects: (1) the requirement that a guilty plea be consistent with all matters arising during the trial is deleted; (2) the constitutional standard for acceptance of guilty pleas is interjected; (3) the prohibition against guilty pleas to offenses for which the death penalty can be awarded is deleted.[552] These revisions will permit modifications to MCM, 1984, deleting the current factual accuracy requirement for guilty pleas and adopting the federal factual basis test. The constitutional standard for acceptance of guilty pleas has not waivered since Kercheval v. United States was decided by the Supreme Court in 1927; the standard set forth therein should be the statutory military standard for guilty pleas.[553] The well-intentioned prohibition against guilty pleas in death penalty cases was designed to preclude factually or legally innocent persons from judicially convicting themselves. However, it also deprives the military accused who will surely face conviction at a trial on the merits from the benefits of a pretrial agreement which could insure that he receives less than the maximum sentence im-

poseable while also saving the government the enormous expense often attendant to trials in capital cases.

B. Revisions to RCM 910

Although RCM 910 is patterned after Rule 11, the case law it has spawned has demonstrated that it is inadequate in many respects. RCM 910 can be more closely aligned with Rule 11, while still providing necessary protection to a military accused who enters a guilty plea. To correspond to Article 45 revisions proposed by Appendix E and to meet the criticisms levelled at the military guilty plea inquiry, revisions of RCM 910 are suggested in Appendix F. These revisions entail several significant changes: (1) the prohibition of guilty pleas in death sentence cases is deleted to conform with the proposed revision to Article 45, UCMJ; (2) the court informs the accused that it has the option of questioning him on the record and, if that option is exercised, his answers under oath could be used to prosecute him for perjury or false statement; (3) the military judge has the option of establishing the factual basis for the guilty plea by questioning the accused, eliciting independent evidence, or both; (4) statements made by the accused anytime during the trial which are inconsistent with the plea do not result in automatic rejection of the plea; (5) if the military judge rejects a guilty plea, the reasons for such rejection must be stated on the record;[554] (6) once the requirements of RCM 910 for acceptance of a guilty plea are met, the accused acquires an absolute right to have such a plea accepted.

The proposed revisions to RCM 910 permit military courts to establish the factual basis for a guilty plea by means other than direct inquiry of the accused, in line with the current procedure in the federal system. The requirement for a factually accurate guilty plea to be established by the accused is deleted, permitting constitutional equivocal pleas in the military such as that addressed in North Caroline v. Alford.[555] Consistent with this important change, the military judge would be allowed to consider statements by the accused which are inconsistent with the guilty plea as simply another factor to be addressed in the assessment of whether a factual basis for the plea has been established. The proposed revision further implements the Supreme Court's suggestion in Alford that a jurisdiction may choose to confer on the accused the right to have his guilty plea accepted by the court.[556] By requiring the military judge to set forth on the record reasons for rejection of a guilty plea, the accused is afforded the opportunity to have the court's decision applying Article 45 and RCM 910 reviewed by appellate courts for abuse of discretion.

It is noteworthy that the proposed revision to RCM 910 makes no changes to requirements for plea agreement inquiries. The current provisions of MCM, 1984 do not require the in-depth review mandated by United States v. Green and its progeny.[557] Thus, adoption of the modified plea agreement inquiry suggested earlier would necessarily be made through reconsideration of case law by the military appellate courts.[558]

C. Proposed Revised Procedure for Military Guilty Plea Inquiry

If implemented, the proposed changes to Article 45, UCMJ, RCM 910, and the suggested alternative approaches to the military guilty plea inquiry would necessitate revised procedural guidelines for the hearing. Such revision is suggested in Appendix G. The proposed changes differ in several critical aspects from the current military practice: (1) the court's advice to the accused includes flexibility in determining whether to establish the factual basis for the plea through testimony of the accused or through other evidence; (2) it provides for submission of an affidavit from the accused and his lawyer to assist the court in determining the voluntary and understanding nature of the plea, reflecting an increased defense counsel role; (3) the means of court inquiry into the constitutionality and factual basis of the plea are much simpler; (4) it provides a means by which a constitutional guilty plea entered by an accused unable to judicially confess his guilty may be accepted by the court; (5) it includes a truncated means for evaluation of a pretrial agreement's impact on the acceptability of a guilty plea; (6) it implements the accused's right to have a constitutional plea accepted which is conveyed by the proposed revisions to RCM 910; (7) it provides for a record of the guilty plea inquiry which will facilitate appellate review of the military judge's discretion in rejecting a plea; (8) it implements the means by which a guilty plea may be accepted despite

statements during the trial which are inconsistent with the plea.[559]

The proposed revisions to the procedure for military guilty plea inquiries reduce the possibilities that a legally unsophisticated accused may unwittingly provide responses to the military judge which result in the rejection of his plea. They encourage the accused to be truthful and help alleviate the ethical dilemma facing a defense lawyer whose client desires to fabricate in order to preserve a guilty plea. This motivation for truthfulness will create a record which is more accurate and facilitates meaningful appellate review of the case. The simple and direct procedural means provided for military court evaluation of the plea's constitutionality, factual basis, and the pretrial agreement will involve less court time and conserve judicial resources. The discretion of the military judge to reject guilty pleas is reduced and a meaningful basis for appellate review is provided. The military judge will no longer have incentive to make an unreasoned rejection of a guilty plea in order to avoid appellate court scrutiny of the plea inquiry. Finally, the proposed procedure will encourage the military accused to place all available extenuating and mitigating evidence on the record during sentencing without fear that it may be inconsistent with the guilty plea and result in a rejected plea. Such incentive may have the consequential effect of sentences which more accurately reflect the individual circumstances of the case.

D. Overall Impact of Proposals

An assessment of the impact of the above proposals on the military guilty plea inquiry calls for a return to the framework for analysis discussed earlier.[560] The proposals will virtually not affect the pleading decision of an accused primarily motivated by any of the factors mentioned. However, they may have enormous significance to the accused faced with overwhelming government evidence, who, with the advice of competent counsel, makes the reasoned decision to plead guilty to alleviate the concerns suggested by those factors. Even the accused who is primarily motivated by his erroneous conclusion of legal guilt will be well served by the proposals; the military court will be able to ferret out ignorance, deception or delusion leading to the accused's erroneous conclusion at least as well as under current military procedure. The most significant advantage provided by the proposals is that an accused motivated by a strong government case against him is afforded the opportunity to avail himself of an advantageous plea bargain. Thus, the proposals provide increased fairness to the accused with no attendant negative impact on his pleading decision.

The proposals will also not be detrimental to the waiver of the rights of an accused pleading guilty at court-martial. Under the revised guilty plea procedural rules and guidelines, matters such as jurisdictional defects, rights to counsel and a host of sentencing errors will still be reviewable by military appellate courts, as under the current system for acceptance of guilty pleas.[561] Additionally, the

integrity of the military justice system would be preserved. While the proposals for reform would result in procedural economy, they still address the concerns expressed by Congress in enacting Article 45, UCMJ and by COMA in the Luebbs decision.[562] The proposals merely return the emphasis in the acceptance of military guilty pleas to the constitutional requirements recognized by the United States Supreme Court. That such emphasis also results in judicial economy and the increased ability of a military accused to enjoy the benefits of his plea bargain in a manner equal to a similarly situated federal defendant will enhance perceptions that military justice system affords the opportunity for a fair trial.

VII. Conclusion

Since the enactment of Article 45, UCMJ, the military has structured its law concerning the acceptance of guilty pleas around the precept that governmental abuse should be restrained. Perhaps that emphasis is an outgrowth of the historical mistrust of guilty pleas. A more likely explanation is that it reflects a concern that the military justice system will be perceived as more responsive to its needs for discipline than the due process mandate of the United States Constitution. Since the enactment of the UCMJ, military law, like most common law systems, has been in a constant state of change. During that period, while significant Supreme Court decisions have been handed down in the area, the basic constitutional standard for the acceptance of guilty pleas has remained intact.

With the Supreme Court's recognition of plea bargaining, the federal criminal system and the military justice system shared many similar concerns in developing case law to implement the constitutional standard for guilty pleas. In Rule 11 and RCM 910, those concerns have been manifested through procedural regulations with many similarities. The few areas of disagreement, along with manifestly differing appellate interpretations of similar provisions of the rules, have led to case law which is widely divergent when the two systems are compared. Both systems have developed extra-constitutional safeguards for the protection of the accused entering a guilty plea. However, the military appellate courts have gone far beyond the federal courts in assuring the voluntary and understanding nature of guilty pleas.

Certainly, there are significant differences between the military justice system and the federal system worthy of note. The military justice system is designed to function under a code with world-wide applicability. The leadership position of the CA, who is responsible for negotiating pre-trial agreements with the accused, is without parallel in the federal system. Unless awarded a punitive discharge at court-martial, the return of the accused to an active military unit after his sentence is served is unique to military justice. The military accused may have negative perceptions of procedural fairness of the pleading process in a system where the prosecutor, military judge and the defense counsel are all in the same employ. However, these differences between

the military and federal justice systems solidify arguments that the military accused should be treated equally to his federal counterpart. The modern day emphasis on plea bargaining has raised the military accused's interest in obtaining the benefit of such a bargain to nearly constitutional dimensions. The military accused whose pretrial agreement is rejected because his plea fails to survive the scrutiny required by extra-constitutional military protections will often: (1) view such results as a means by which the CA can escape his plea bargaining obligations; (2) cultivate greater mistrust for his defense counsel and detract from further defense efforts on his behalf; (3) develop perceptions of unfairness which impact his prospects for rehabilitation, making future credible service unlikely when he returns to a military unit upon completion of sentence. Thus, the current military law regarding acceptance of guilty pleas detracts from its effectiveness in a worldwide arena.

This paper has suggested the enactment of changes to both Article 45, UCMJ and RCM 910. Insofar as the proposals modify the requirement for factually accurate guilty pleas, Congressional action to revise Article 45 is necessary. Congress has historically accorded much deference to military appellate decisions and has only acted once to nullify a COMA decision.[563] Thus, the proposed revisions to RCM 910 will likely withstand Congressional scrutiny if approved by COMA. This author therefore suggests that the position of COMA regarding the acceptance of guilty pleas in the military be reassessed to comport with constitutional mandate, the more

compelling features of federal law and the fundamental fairness considerations underlying military justice.

APPENDIX A-1

Rule 11, Federal Rules of Criminal Procedure

(a) **Alternatives.**

(1) **In General.** A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(2) **Conditional Pleas.** With appproval of the court and the consent of the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. If the defendant prevails on appeal, he shall be allowed to withdraw his plea.

(b) **Nolo Contendere.** A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

(c) **Advice to Defendant.** Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole term and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense; and

(2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him, and if necessary, one will be appointed to represent him; and

(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

(4) that if his plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which he has pleaded, that his answers may later be used against him in a prosecution for perjury or false statement.

(d) **Insuring That the Plea is Voluntary.** The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney.

(e) **Plea Agreement Procedure.**

(1) **In General.** The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

(2) **Notice of Such Agreement.** If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw his plea.

(3) Acceptance of a Plea Agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the position of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) Time of Plea Agreement Procedure. Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) Inadmissibility of Pleas, Plea Discussions, and Related Statements. Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(A) a plea of guilty which was later withdrawn;

(B) a plea of nolo contendere;

(C) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or

(D) any statement made in the course of plea discussions with any attorney for the government which does not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

(f) Determining Accuracy of Plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

(g) Record of Proceedings. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitations, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

(h) Harmless Error. Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.

APPENDIX B

Article 45, UCMJ

(a) If an accused after arraignment makes an irregular pleading, or after a plea of guilty sets up matter inconsistent with the plea, or if he fails or refuses to plead, a plea of not guilty shall be entered in the record, and the court shall proceed as though he had pleaded not guilty.

(b) A plea of guilty by the accused may not be received to any charge or specification alleging an offense for which the death penalty may be adjudged. With respect to any other charge or specification to which a plea of guilty has been made by the accused and accepted by the military judge or by a court-martial without a military judge, a finding of guilty of the charge or specification may, if permitted by regulations of the Secretary concerned, be entered immediately without vote. This finding shall constitute the finding of the court unless the plea of guilty is withdrawn prior to announcement of the sentence, in which event the proceedings shall continue as though the accused had pleaded not guilty.

APPENDIX C-1

MCM, 1984, RCM 910

(a) Alternatives.

(1) **In general.** An accused may plead not guilty or guilty. An accused may plead, by exceptions or by exceptions and substitutions, not guilty to an offense as charged, but guilty to an offense included in that offense. A plea of guilty may not be received as to an offense for which the death penalty may be adjudged by the court-martial.

(2) **Conditional pleas.** With the approval of the military judge and the consent of the Government, an accused may enter a conditional plea of guilty, reserving in writing the right, on further review or appeal, to review of the adverse determination of any specified pretrial motion. If the accused prevails on further review or appeal, the accused shall be allowed to withdraw the plea of guilty. The Secretary concerned may prescribe who may consent for the Government; unless otherwise prescribed by the Secretary concerned, the trial counsel may consent on behalf of the Government.

(b) **Refusal to plead; irregular plea.** If an accused fails or refuses to plead, or makes an irregular plea, the military judge shall enter a plea of not guilty for the accused.

(c) **Advice to accused.** Before accepting a plea of guilty, the military judge shall address the accused personally and inform the accused of, and determine that the accused understands, the following:

(1) The nature of the offense to which the plea is offered, the mandatory minimum penalty, if any, provided by law, and the maximum possible penalty provided by law;

(2) In a general or special court-martial, if the accused is not represented by counsel, that the accused has the right to be represented by counsel at every stage of the proceedings;

(3) That the accused has the right to plead not guilty or to persist in that plea if already made, and that the accused has the right to be tried by a court-martial, and that at such trial the accused has the right to confront and cross-examine witnesses against the accused, and the right against self-incrimination;

(4) That if the accused pleads guilty, there will not be a trial of any kind as to those offenses to which the accused has so pleaded, so that by pleading guilty the accused waives the rights described in subsection (c)(3) of this rule; and

(5) That if the accused pleads guilty, the military judge will question the accused about the offenses to which the accused has pleaded guilty, and, if the accused answers these questions under oath, on the record, and in the presence of counsel, the accused's answers may later be used against the accused in a prosecution for perjury or false statement.

(d) **Ensuring that the plea is voluntary.** The military judge shall not accept a plea of guilty without first, by addressing the accused personally, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement under R.C.M. 705. The military judge shall also inquire whether the accused's willingness to plead guilty results from prior discussions between the convening authority, a representative of the convening authority, or trial counsel, and the accused or defense counsel.

(e) **Determing accuracy of plea.** The military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea. The accused shall be questioned under oath about the offenses.

(f) Plea agreement inquiry.

(1) **In general.** A plea agreement may not be accepted if it does not comply with R.C.M. 705.

(2) **Notice.** The parties shall inform the military judge if a plea agreement exists.

(3) **Disclosure.** If a plea agreement exists, the military judge shall require disclosure of the entire agreement before the plea is accepted, provided that in trial before military judge alone the military judge ordinarily shall not examine any sentence limitation contained in the agreement until after the sentence of the court-martial has been announced.

(4) **Inquiry.** The military judge shall inquire to ensure:

(A) That the accused understands the agreement; and

(B) That the parties agree to the terms of the agreement.

(g) Findings. Findings based on a plea of guilty may be entered immediately upon acceptance of the plea at an Article 39(a) session unless:

(1) Such action is not permitted by regulations of the Secretary concerned;

(2) The plea is to a lesser included offense and the prosecution intends to proceed to trial on the offense as charged; or

(3) Trial is by a special court-martial without a military judge, in which case the president of the court-martial may enter findings based on the pleas without a formal vote except when subsection (g)(2) of this rule applies.

(h) Later action.

(1) Withdrawal by the accused. If after acceptance of the plea but before the sentence is announced the accused requests to withdraw the plea of guilty and substitute a plea of not guilty or a plea of guilty to a lesser included offense, the military judge may as a matter of discretion permit the accused to do so.

(2) Statements by accused inconsistent with plea. If after findings but before the sentence is announced the acccused makes a statement to the court-martial, in testimony or otherwise, or presents evidence which is inconsistent with a plea of guilty on which a finding is based, the military judge shall inquire into the providence of the plea. If, following such inquiry, it appears that the accused entered the plea improvidently or through lack of understanding of its meaning and effect a plea of not guilty shall be entered as to the affected charges and specifications.

(3) Pretrial agreement inquiry. After sentence is announced the military judge shall inquire into any parts of a pretrial agreement which were not previously examined by the military judge. If the military judge determines that the accused does not understand the material terms of the agreement, or that the parties disagree as to such terms, the military judge shall conform, with the consent of the Government, the agreement to the accused's understanding or permit the accused to withdraw the plea.

(i) **Record of proceedings.** A verbatim record of the guilty plea proceedings shall be made in cases in which a verbatim record is required under R.C.M. 1103. In other special courts-martial, a summary of the explanation and replies shall be included in the record of trial. As to summary courts-martial, see R.C.M. 1305.

(j) **Waiver.** Except as provided in subsection (a)(2) of this rule, a plea of guilty which results in a finding of guilty waives any objection, whether or not previously raised, insofar as the objection relates to the factual issue of guilt of the offense(s) to which the plea was made.

APPENDIX D-1

MCM, 1984, RCM 705

(a) **In general.** Subject to such limitations as the Secretary concerned may prescribe, an accused and the convening authority may enter into a pretrial agreement in accordance with this rule.

(b) **Nature of agreement.** A pretrial agreement may include:

(1) A promise by the accused to plead guilty to, or to enter a confessional stipulation as to one or more charges and specifications, and to fulfill such additional terms or conditions which may be included in the agreement and which are not prohibited under this rule; and

(2) A promise by the convening authority to do one or more of the following:

(A) Refer the charges to a certain type of court-martial;

(B) Refer a capital offense as noncapital;

(C) Withdraw one or more charges or specifications from the court-martial;

(D) Have the trial counsel present no evidence as to one or more specifications or portions thereof; and

(E) Take specified action on the sentence adjudged by the court-martial.

(c) **Terms and conditions.**

(1) **Prohibited terms or conditions.**

(A) **Not voluntary.** A term or condition in a pretrial agreement shall not be enforced if the accused did not freely and voluntarily agree to it.

(B) **Deprivation of certain rights.** A term or condition in a pretrial agreement shall not be enforced if it deprives the accused of: the right to counsel; the right to due process; the right to challenge the jurisdiction of the court-martial; the right to a speedy trial; the right to complete sentencing proceedings; the complete and effective exercise of posttrial and appellate rights.

(2) **Permissible terms or conditions.** Subject to subsection (c)(1)(A) of this rule, subsection (c)(1)(B) of this rule does not prohibit an accused from offering the following additional conditions with an offer to plead guilty:

(A) A promise to enter into a stipulation of fact concerning offenses to which a plea of guilty or as to which a confessional stipulation will be entered;

(B) A promise to testify as a witness in the trial of another person;

(C) A promise to provide restitution;

(D) A promise to conform the accused's conduct to certain conditions of probation before action by the convening authority as well as during any period of suspension of the sentence, provided that the requirements of R.C.M. 1109 must be complied with before an alleged violation of such terms may relieve the convening authority of the obligation to fulfill the agreement; and

(E) A promise to waive procedural requirements such as the Article 32 investigation, the right to trial by court-martial composed of members or the right to request trial by military judge alone, or the opportunity to obtain the personal appearance of witnesses at sentencing proceedings.

(d) **Procedure.**

(1) **Offer.** An offer to plead guilty or to enter a confessional stipulation must originate with the accused and defense counsel, if any.

(2) **Negotiation.** Upon the initiation of the defense, the convening authority, the staff judge advocate, or the trial counsel may negotiate the terms and conditions of a pretrial agreement with the defense. All negotiations shall be with defense counsel unless the accused is not represented.

(3) **Formal submission.** After negotiation, if any, under subsection (d)(2) of this rule, if the accused elects to propose a pretrial agreement, the defense shall submit a written offer. All terms, conditions, and promises between the parties shall be written. The proposed agreement shall be signed by the accused and defense counsel, if any. If the agreement contains any specified action on the adjudged sentence, such action shall be set forth on a page separate from the other portions of the agreement.

(4) Acceptance. The convening authority may either accept or reject an offer of the accused to enter into a pretrial agreement. The decision is within the sole discretion of the convening authority. When the convening authority has accepted a pretrial agreement, the agreement shall be signed by the convening authority or by a person, such as the staff judge advocate or trial counsel, who has been authorized by the convening authority to sign.

(5) Withdrawal.

(A) By accused. The accused may withdraw from a pretrial agreement at any time; however, the accused may withdraw a plea of guilty or a confessional stipulation entered pursuant to a pretrial agreement only as provided in R.C.M. 910(h) or 811(d), respectively.

(B) By convening authority. The convening authority may withdraw from a pretrial agreement at any time before the accused begins performance of promises contained in the agreement, upon the failure by the accused to fulfill any material promise or condition in the agreement, when inquiry by the military judge discloses a disagreement as to a material term in the agreement, or if findings are set aside because a plea of guilty entered pursuant to the agreement is held improvident on appellate review.

(e) Nondisclosure of existence of agreement. Except in a special court-martial without a military judge, no member of a court-martial shall be informed of the existence of a pretrial agreement. In addition, except as provided in Mil. R. Evid. 410, the fact that an accused offered to enter into a pretrial agreement, and any statements made by an accused in connection therewith, whether during negotiations or during providence inquiry, shall not be otherwise disclosed to the members.

APPENDIX E

Proposed Revised Article 45, UCMJ

Pleas of the Accused

(a) If an accused after arraignment makes an irregular pleading, or if it appears that he has entered a plea of guilty involuntarily or through lack of understanding of its meaning and effect, or if he fails or refuses to plead, a plea of not guilty shall be entered in the record, and the court shall proceed as though he had pleaded not guilty.

(b) With respect to any charge or specification to which a plea of guilty has been made by the accused and accepted by the military judge or by a court-martial without a military judge, a finding of guilty on the charge or specification may, if permitted by the regulations of the Secretary concerned, be entered immediately without vote. This finding shall constitute the finding of the court unless the plea of guilty is withdrawn prior to the announcement of the sentence, in which event the proceedings shall continue as though the accused had pleaded not guilty.

APPENDIX F-1

Proposed Revised RCM 910

(a) Alternatives.

(1) **In general.** An accused may plead not guilty or guilty. An accused may plead, by exceptions or by exceptions and substitutions, not guilty to an offense as charged, but guilty to an offense included in that offense.

(2) **Conditional pleas.** With the approval of the military judge and the consent of the Government, an accused may enter a conditional plea of guilty, reserving in writing the right, on further review or appeal, to review of the adverse determination of any specified pretrial motion. If the accused prevails on further review or appeal, the accused shall be allowed to withdraw the plea of guilty. The Secretary concerned may prescribe who may consent for the Government; unless otherwise prescribed by the Secretary concerned, the trial counsel may consent on behalf of the Government.

(b) **Refusal to plead; irregular plea.** If an accused fails or refuses to plead, or makes an irregular plea, the military judge shall enter a plea of not guilty for the accused.

(c) **Advice to accused.** Before accepting a plea of guilty, the military judge shall address the accused personally and inform the accused of, and determine that the accused understands, the following:

(1) The nature of the offense to which the plea is offered, the mandatory minimum penalty, if any, provided by law, and the maximum possible penalty provided by law;

(2) In a general or special court-martial, if the accused is not represented by counsel, that the accused has the right to be represented by counsel at every stage of the proceedings;

(3) That the accused has the right to plead not guilty or to persist in that plea if already made, and that the accused has the right to be tried by a court-martial, and that at such trial the accused has the right to confront and cross-examine witnesses against the accused, and the right against self-incrimination;

(4) That if the accused pleads guilty, there will not be a trial of any kind as to those offenses to which the accused has so pleaded, so that by pleading guilty the

accused waives the rights described in subsection (c)(3) of this rule; and

(5) That if the military judge intends to question the accused under oath, on the record, and in the presence of counsel about the offense to which he has pleaded that his answers may later be used against him in a prosecution for perjury or false statement.

(d) **Ensuring that the plea is voluntary.** The military judge shall not accept a plea of guilty without first, by addressing the accused personally, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement under R.C.M. 705. The military judge shall also inquire whether the accused's willingness to plead guilty results from prior discussions between the convening authority, a representative of the convening authority, or trial counsel, and the accused or defense counsel.

(e) **Determining factual basis of the plea.** The military judge shall not accept a plea of guilty without making such inquiry as shall satisfy the military judge that there is a factual basis for the plea. If the military judge questions the accused about the offense to which he has pleaded guilty, the accused shall be so questioned under oath.

(f) Plea agreement inquiry.

(1) **In general.** A plea agreement may not be accepted if it does not comply with R.C.M. 705.

(2) **Notice.** The parties shall inform the military judge if a plea agreement exists.

(3) **Disclosure.** If a plea agreement exists, the military judge shall require disclosure of the entire agreement before the plea is accepted, provided that in trial before military judge alone the military judge ordinarily shall not examine any sentence limitation contained in the agreement until after the sentence of the court-martial has been announced.

(4) **Inquiry.** The military judge shall inquire to ensure:

(A) That the accused understands the agreement; and

(B) That the parties agree to the terms of the agreement.

(g) Subject to the provisions of section (i) of this Rule, once the military judge has determined that the accused's guilty plea meets the requirments of sections (a)-(f) of this Rule, a finding that the plea is accepted must be entered on the record and the accused thereby acquires the absolute right to require court acceptance of such plea notwithstanding any claim of innocence by the accused during the course of the trial. Should the military judge determine that the accused's guilty plea does not meet such requirements and rejects such plea, a detailed explanation of the reasons for such rejection shall be set forth on the record.

(h) Findings. Findings based on a plea of guilty may be entered immediately upon acceptance of the plea at an Article 39(a) session unless:

(1) Such action is not permitted by regulations of the Secretary concerned;

(2) The plea is to a lesser included offense and the prosecution intends to proceed to trial on the offense as charged; or

(3) Trial is by a special court-martial without a military judge, in which case the president of the court-martial may enter findings based on the pleas without a formal vote except when subsection (g)(2) of this rule applies.

(i) Later action.

(1) Withdrawal by the accused. If after acceptance of the plea but before the sentence is announced the accused requests to withdraw a plea of guilty and substitute a plea of not guilty or a plea of guilty to a lesser included offense, the military judge may as a matter of discretion permit the accused to do so.

(2) Statements by accused inconsistent with plea. If after findings but before the sentence is announced the accused makes a statement to the court-martial, in testimony or otherwise, or presents evidence inconsistent with the factual basis on which a finding is based, the military judge shall reopen inquiry into the factual basis for the plea. Following such inquiry, the military judge shall reevaluate all testimony and evidence adduced during the trial and reenter a finding as to whether or not a factual basis for the plea exists. If the military judge finds that no factual basis for the plea exists, any acceptance of the plea entered under section (g) of this Rule shall be stricken and a plea of not guilty shall be entered as to the effected charges and

specifications.

(3) Pretrial agreement inquiry. After sentence is announced the military judge shall inquire to ensure that the accused understands any parts of the pretrial agreement which were not previously examined by the military judge and that the parties agree to such terms. If the military judge determines the accused does not understand the material terms of the agreement, or that the parties disagree as to such terms, the military judge shall conform, with the consent of the Government, the agreement to the accused's understanding or permit the accused to withdraw the plea.

(j) Record of proceedings. A verbatim record of the guilty plea proceedings shall be made in cases in which a verbatim record is required under R.C.M. 1103. In other special courts-martial, a summary of the explanation and replies shall be included in the record of trial. As to summary courts-martial, see R.C.M. 1305.

(k) Waiver. Except as provided in subsection (a)(2) of this rule, a plea of guilty which results in a finding of guilty waives any objection, whether or not previously raised, insofar as the objection relates to the factual issue of guilty of the offense(s) to which the plea was made.

APPENDIX G-1

Proposed Revised Procedure for Military Guilty Plea Inquiry

A. Court receives guilty plea.

1. Upon the accused's refusal to plead or upon entry of irregular plea, a plea of not guilty is entered on the accused's behalf.

2. The court determines whether the accused will be allowed to enter a conditional plea.

B. Court advice to accused.

1. The nature of offense and the minimum and maximum penalties for offense are explained.

2. Rights to counsel are explained.

3. Rights to trial on merits, confrontation and cross-examination of witnesses and right against self-incrimination are explained.

4. Waiver of rights is explained.

5. Possibility that accused's answers to court questions under oath can be used in later prosecution for perjury or false statement are explained.

C. Voluntariness of plea established.

1. Defense counsel submits an affidavit detailing the pleading advice given to the accused, counter-signed by the accused. The affidavit should include an affirmation that the accused is competent to plead guilty, possessing a sufficient present ability to consult with his lawyer with a reasonable degree of understanding and has a rational as well as factual understanding of the proceedings against him.

2. The court inquires whether the accused understands the advice provided by the defense counsel.

3. The court inquires whether the accused is satisfied with the advice provided by his defense counsel and that it is in his best interests.

4. The court inquires whether the accused is pleading guilty because of any threats, force, coercion, harassment or misrepresentation.

D. Factual basis for the plea is established.

1. The military judge describes the elements of the offense to which the guilty plea is entered.

2. The military judge inquires whether the accused has discussed both factual and legal guilt of the offense to which the guilty plea is entered with his counsel.

3. The military judge may elicit independent evidence from the Government to establish a factual basis for the guilty plea, including a copy of the pretrial investigation or a written stipulation of fact by the parties. If a stipulation is offered, its effect should be explained to the accused. If the independent evidence is ambiguous or reveals that the accused has doubts about his factual or legal guilt, the military judge may have him placed under oath to testify in clarification of those matters.

4. The military judge may alternatively elicit information from the accused under oath to establish a factual basis for the plea.

5. To establish a factual basis for the guilty plea, it is not necesary for the accused to admit factual and/or legal guilt. A factual basis may be established even when the accused denies guilt of the offense to which a plea is entered. The court must determine on the record that the accused's persistence in pleading guilty despite his claim of innocence represents a reasoned choice. If such a claim of innocence is made by the accused during the guilty plea inquiry, it is a circumstance to be considered by the military judge along with all other evidence elicited in the determination of whether a factual basis for the plea has been established. To determine that a factual basis exists, the military judge must be subjectively convinced that the evidence is reasonably sufficient to obtain a conviction at a trial on the merits.

E. Jurisdiction over the accused is established.

1. The court inquires of the accused as to his identity and whether he is the person charged with the offense to which the guilty plea is entered.

2. The court inquires of the accused whether he was on active duty in the U.S. Armed Forces on the date of the offense to which the plea is entered and has remained in that status since that date.

F. Acceptability of plea agreement established.

1. The court inquires whether a pretrial agreement exists in the case. If such agreement exists, it is provided to the military judge, minus its sentencing provisions and is scrutinized by court.

2. After perusing the pretrial agreement, the military judge announces the court's interpretation of any ambiguous provisions.

3. The parties are then given an opportunity to object to the court's interpretation of provisions or request clarification of provisions not addressed by the court.

4. If the accused's interpretation of a provision does not comport with that of the court, then the court, with the concurrence of the Government, will modify the agreement in accordance with the accused's understanding. Otherwise, the parties may be given recess to renegotiate the agreement or the accused may be allowed to withdraw the guilty plea.

5. The court inquires whether the accused understands the pretrial agreement, agrees to its terms and is satisfied with the representation and advice he has received from his counsel regarding it.

6. The court inquires whether the pretrial agreement offer originated with the defense and was made because threats, force, coercion, harassmennt or misrepresentation.

G. Acceptance or rejection of plea.

The court determines whether guilty plea is acceptable and, if so, makes a finding to that effect. If the plea is not acceptable, the military judge shall make a detailed explanation on the record of the reasons for rejecting the plea. Upon acceptance of the guilty plea, findings on the merits of the case may be made immediately.

H. Inconsistent statements of accused

If, after acceptance of the guilty plea by the military court, the accused makes statements or presents evidence inconsistent with the factual basis established earlier, the military judge should reopen the factual basis inquiry. The military judge should then reevaluate the factual basis for the plea and, if it no longer exists, withdraw his acceptance of the plea.

I. Acceptability of sentencing terms of pretrial agreement

1. After the sentence is announced, the military

judge should obtain the sentencing provisions to the pretrial agreement and announce the court's interpretation of any ambiguous provisions.

2. The parties are then given an opportunity to object to the court's interpretation of the sentencing provisions or request clarification of provisions not addressed by the court.

3. If the accused disagrees with the court's interpretation of the sentencing provisions, the military judge may, with the Government's consent, conform them to the accused's understanding, or allow the accused to withdraw his plea.

FOOTNOTES

1 For example, in the County of San Diego, California, approximately 2000 felony cases were indicted between 1885 and 1960. Since 1960, some 83,000 felony cases were indicted. Lecture by Professor Alex Landon, University of San Diego School of Law in San Diego, California (April 9, 1987).

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172 Coody v. United States, 570 F. 2d 540 (5th Cir. 1978). United States v. O'Donnell, 539 F. 2d 1233 (9th Cir. 1976).

173 United States v. Del Prete, 567 F. 2d 928 (9th Cir. 1978). United States v. Adams, 566, F. 2d 962 (5th Cir. 1978).

174 United States v. Benavides, 596 F. 2d 137 (5th Cir. 1979). United States v. Howard, 588 F. 2d 471 (5th Cir. 1979).

175 United States v. Saft, 558 F. 2d 1073 (2nd Cir. 1977).

176 Helton v. United States, 302 F. 2d 558 (5th Cir. 1962).

177 United States v. Bell, 776 F. 2d 965 (11th Cir. 1985). United States v. Samuels, 726 F. 2d 389 (8th Cir. 1984). Osborne v. Thompson, 481 F. Supp. 162 (D.C. Tenn. 1979).

178 Wright v. United States, 624 F. 2d 557 (5th Cir. 1981). Limon-Gonzales v. United States, 499 F. 2d 936 (5th Cir. 1974). Tucker v. United States, 409 F. 2d 1291 (5th Cir. 1969).

179 United States v. Garcia, 698 F. 2d 31 (1st Cir. 1983). Hunter v. Fogg, 616 F. 2d 55 (2nd Cir. 1980).

180 Lewis v. United States, 601 F. 2d 1100 (9th Cir. 1979).

181 United States v. Jackson, 627 F. 2d 883 (8th Cir. 1980). United States v. DeGand, 614 F. 2d 176 (8th Cir. 1980). Harris v. United States, 493 F. 2d 1213 (8th Cir. 1974). Paradiso v. United States, 482 F. 2d 409 (3rd Cir. 1973). United States v. Theodorou, 576 F. Supp. 1007 (D.C. Ill. 1983).

182 United States v. Ammirato, 670 F. 2d 552 (5th Cir. 1982).

183 United States v. Gray, 611 F. 2d 194 (7th Cir. 1979).

184 Kelleher v. Henderson, 531 F. 2d 78 (2nd Cir. 1976). Duffy v. Cuyler, 581 F. 2d 1059 (3rd Cir. 1978).

185 United States v. Bucchino, 606 F. 2d 590 (5th Cir. 1979). Keel v. United States, 572 F. 2d 1135 (5th Cir. 1978). Coody v. United States, 570 F. 2d 540 (5th Cir. 1978). Government of Canal Zone v. Tobar, 565 F. 2d 1321 (5th Cir. 1978).

186 United States v. Sapp, 439 F. 2d 817 (5th Cir. 1971).

187 Hill v. Lockhart, 731 F. 2d 568 (8th Cir. 1984). Bunker v. Wise, 550 F. 2d 1155 (9th Cir. 1977). Herrera v. United States, 507 F. 2d 143 (5th Cir. 1975). Arias v. United States, 484 F. 2d 577 (7th Cir. 1973). United States v. Farias, 459 F. 2d 738 (5th Cir. 1972). United States v. Smith, 440 F. 2d 521 (7th Cir. 1971). Sanchez v. United States, 417 F. 2d 494 (5th Cir. 1969). Trujillo v. United States, 377 F. 2d 266 (5th Cir. 1967).

188 United States v. Baylin, 696 F. 2d 1030 (3rd Cir. 1982).

189 Gates v. United States, 515 F. 2d 73 (7th Cir. 1975). Harris v. United States, 426 F. 2d 99 (6th Cir. 1970). Berry v. United States, 412 F. 2d 189 (3rd Cir. 1969).

190 Sanchez v. United States, 572 F. 2d 210 (9th Cir. 1977).

191 United States v. Rivera-Ramirez, 715 F. 2d 453 (9th Cir. 1983).

192 United States v. Eaton, 579 F. 2d 1181 (10th Cir. 1978). Richardson v. United States, 577 F. 2d 447 (8th Cir. 1978). United States v. Hamilton, 553 F. 2d 63 (10th Cir. 1977). United States v. Watson, 548 F. 2d 1058 (D.C. Cir. 1977).

193 Minimal special parole explanations were required in

United States v.Crook, 607 F. 2d 670 (5th Cir. 1979). United States v. Vela, 606 F. 2d 1224 (D.C. Cir. 1979). Michel v. United States, 507 F. 2d 461 (2nd Cir. 1974). Detailed special parole explanations were required in United States v. Keefe, 621 F. 2d 17 (1st Cir. 1980). Moore v. United States, 592 F. 2d 753 (4th Cir. 1979).

194 United States v. Lansford, 787 F. 2d 465 (9th Cir. 1977).

195 United States v. Jackson, 627 F. 2d 883 (8th Cir. 1980). Young v. United States, 228 F. 2d 693 (8th Cir. 1956).

196 George v. United States, 633 F. 2d 1299 (9th Cir. 1980).

197 United States v. Saft, 558 F. 2d 1073 (2nd Cir. 1977). United States v. Oldham, 787 F. 2d 454 (8th Cir. 1986).

198 United States v. Caston, 615 F. 2d 1111 (5th Cir. 1980). Franklin v. United States, 589 F. 2d 192 (5th Cir. 1979). Kloner v. United States, 535 F. 2d 730 (2nd Cir. 1976).

199 United States v. Kriz, 621 F. 2d 306 (8th Cir. 1980). United States v. Caston, 615 F. 2d 1111 (5th Cir. 1980). United States v. Gray, 611 F. 2d 194 (7th Cir. 1979). United States v. Conrad, 598 F. 2d 506 (9th Cir. 1979). C. F. United States v. Howard, 588 F. 2d 471 (5th Cir. 1979).

200 Rule 11, supra note 153, at section (d).

201 394 U.S. 459. United States v. Masthers, 539 F. 2d 721 (D.C. Cir. 1976).

202 United States v. Riegelsperger, 646 F. 2d 1235 (8th Cir. 1981). United States v.Lincecum, 568 F. 2d 1229 (5th Cir. 1978). Majko v. United States, 457 F. 2d 790 (7th Cir. 1972).

203 United States v. Fels, 599 F. 2d 142 (7th Cir. 1979). United States v.Laura, 500 F. Supp. 1347 (D.C. Pa. 1980).

204 Some decisions have allowed the prosecution or the clerk of the court to address the accused. See United States v. Cooper, 725 F. 2d 756 (D.C. Cir. 1984). United States v. Hamilton, 568 F. 2d 1302 (9th Cir. 1978). United States v. Mileto, 434 F. 2d 251 (2nd Cir. 1970). Other decisions have deemed that failure of the judge to specifically address the accused is reversible error. See United States v. Carter, 662 F. 2d 274 (4th Cir. 1981). United States v. Clark, 574 F. 2d 1357 (5th Cir. 1978). United States v. Crook, 526 F. 2d 708 (5th Cir. 1976).

205 Sappington v. United States, 523 F. 2d 858 (8th Cir.

1975). Harris v. United States, 493 F. 2d 1213 (8th Cir. 1974). Fambo v. Smith, 433 F. Supp. 590 (D.C. NY 1977). United States v. Aleman, 417 F. Supp. 117 (D.C. Tex. 1976).

206 United States v. Guichard, 779 F. 2d 1139 (5th Cir. 1986).

207 McBryar v. McElroy, 510 F. Supp. 706 (D.C. Ga. 1981).

208 Lilly v. United States, 792 F. 2d 1541 (11th Cir. 1986).

209 See Chavez v. United States, 656 F. 2d 512 (9th Cir. 1981) for discussion of competency to plead.

210 Tweedy v. Clark, 435 F. 2d 702 (8th Cir. 1970). Jackson v. United States, 512 F. 2d 772 5th Cir. 1975). Williams v. United States, 500 F. 2d 42 (10th Cir. 1974).

211 United States v. Kramer, 781 F. 2d 1380 (9th Cir. 1986).

212 Coody v. United States, 570 F. 2d 540 (5th Cir. 1978). United States v. Gray, 584 F. 2d 96 (5th Cir. 1978).

213 United States v. Stitzer, 785 F. 2d 1506 (11th Cir. 1986). Clemmons v. United States, 721 F. 2d 235 (8th Cir. 1983). United States v. Cammisano, 599 F. 2d 851 (8th Cir. 1979).

214 United States v. Araiza, 693 F. 2d 382 (5th Cir. 1982). Cabrena v. United States, 347 F. Supp. 936 (D.C. Mass. 1972). United States v. Goodman, 590 F. 2d 705 (8th Cir. 1979).

215 United States v. Marzgliano, 588 F. 2d 395 (3rd Cir. 1978). Lepera v. United States, 587 F. 2d 433 (9th Cir. 1978).

216 Gibilterra v. United States, 428 F. 2d 393 (9th Cir. 1970). Turner v. United States, 320 F. Supp. 1204 (D.C. La. 1970).

217 Johnson v. United States, 539 F. 2d 1241 (9th Cir. 1976). Taliaferro v. United States, 330 F. Supp. 408 (D.C. Cal. 1971).

218 United States v. Morin, 265 F. 2d 241 (3rd Cir. 1959). Huffman v. State of Missouri, 399 F. Supp. 1196 (D.C. Mo. 1975).

219 See United States v. Schmidt, 376 F. 2d 751 (4th Cir. 1967).

220 Rule 11, supra note 153, at sections (e)(3); (e)(4).

221 United States v. Barker, 681 F. 2d 589 (9th Cir. 1982).

222 Moody v. United States, 497 F. 2d 359 (7th Cir. 1974). Walters v. Harris, 460 F. 2d 988 (4th Cir. 1972). Rule 11, supra note 153, at section (e)(2).

223 United States v. Mack, 655 F. 2d 843 (8th Cir. 1981). United States v. Adams, 634 F. 2d 830 (5th Cir. 1981). Rule 11, supra note 153, at section (e)(1). See also United States v. Brighton Building & Maintenance Co., 431 F. Supp. 1115 (D.C. Ill. 1977).

224 United States v. Roberts, 570 F. 2d 999 (D.C. Cir. 1977). Yothers v. United States, 572 F. 2d 1326 (9th Cir. 1978).

225 Rule 11, supra note 153, at section (c)(5). United States v. White, 583 F. 2d 819 (6th Cir. 1978).

226 Rule 11, supra note 153, at section (e)(2).

227 United States v. Rodriguez, 625 F. Supp. 909 (D.C. Puerto Rico 1986). United States v. Babineau, 795 F. 2d 518 (5th Cir. 1986). United States v. Inquinta, 719 F. 2d 83 (4th Cir. 1983). United States v. Missouri Valley Construction Co., 704 F. 2d 1026 (8th Cir. 1983). United States v. Stanton, 703 F. 2d 974 (6th Cir. 1983).

228 Rule 11, supra note 153, at section (f); Notes of Advisory Committee, p. 347.

229 See United States v. Romanello, 425 F. Supp. 304 (D.C. Conn. 1975).

230 Rule 11, supra note 153, at Notes of Advisory Committee, p. 347.

231 Id. United States v. Brown, 481 F. 2d 1035 (8th Cir. 1973). United States v. Romanello, 425 F. Supp. 304 (D.C. Conn. 1975).

232 Supra notes 125-149 and accompanying text.

233 Rule 11, supra note 153, at section (f); Notes of Advisory Committee on Rules, p. 347.

234 United States v. Dayton, 604 F. 2d 931 (5th Cir. 1979).

235 United States v. Montoya-Camacho, 644 F. 2d 480 (5th Cir. 1981). United States v. King, 604 F. 2d 411 (5th Cir. 1979).

236 United States v.Navedo, 516 F. 2d 293 (2nd Cir. 1975).

237 Seiller v. United States, 544 F. 2d 554 (2nd Cir. 1977).

238 United States v. Thompson, 680 F. 2d 1145 (7th Cir. 1982).

239 Knight v. United States, 611 F. 2d 918 (1st Cir. 1979).

240 Benson v. United States, 552 F. 2d 223 (8th Cir. 1977).

241 Christopher v. United States, 541 F. 2d 507 (5th Cir. 1976). United States v. Bradin, 535 F. 2d 1039 (8th Cir. 1976). Burton v. United States, 483 F. 2d 1182 (9th Cir. 1973).

242 United States v. Manglitz, 773 F. 2d 1463 (4th Cir. 1985).

243 Ruiz v. United States, 494 F. 2d 1 (5th Cir. 1974).

244 United States v. Isabel, 468 F. Supp. 152 (D.C. Tenn. 1979).

245 Carreon v. United States, 578 F. 2d 176 (7th Cir. 1978).

246 Sena v. Romero, 617 F. 2d 579 (10th Cir. 1980).

247 McCarthy v. United States, 394 U.S. 459, 466 (1968).

248 Rule 11, supra note 153, at section (c).

249 Id. at section (d).

250 Id. at section (f).

251 Id. at section (c).

252 Overholser v. Lynch, 288 F. 2d 388 (D.C. Cir. 1961). Trembley v. Overholser, 199 F. Supp. 569 (D.D.C. 1961). United States v. Navedo, 516 F. 2d 293 (2nd Cir. 1974).

253 363 F. 2d 306 (D.C. Cir. 1966).

254 405 F. 2d 1378 (D.C. Cir. 1968).

255 485 F. 2d 1046 (D.C. Cir. 1973).

256 405 F. 2d at 1380.

257 497 F. 2d 615 (D.C. Cir. 1974).

258 Id. at 623.

259 486 F. 2d 15 (5th Cir. 1973).

260 514 F. 2d 80 (5th Cir. 1975).

261 524 F. 2d 504 (5th Cir. 1975).

262 514 F. 2d at 91. 524 F. 2d at 514.

263 564 F. 2d 700 (5th Cir. 1977).

264 Id. at F.N. 4.

265 See United States v. Escalante, 637 F. 2d 1197 (9th Cir. 1980). United States v. Escobar Noble, 653 F. 2d 34 (1st Cir. 1981). United States v. Cohen, 644 F. Supp. 113 (E.D. Mich. 1986).

266 United States v. Ellis, 547 F. 2d 863 (5th Cir. 1977). United States v. Moore, 637 F. 2d 1194 (9th Cir. 1981). United States v. Adams, 634 F. 2d 830 (5th Cir. 1981). United States v. Ocunas, 628 F. 2d 353 (5th Cir. 1980). United States v. Yates, 698 F. 2d 828 (6th Cir. 1983).United States v. Barker, 681 F. 2d 589 (9th Cir. 1982). United States v. Holman, 728 F. 2d 809 (6th Cir. 1984).

267 United States v. Cohen, 644 F. Supp. 113 (E.D. Mich. 1980).

268 722 F. 2d 562, 566 (9th Cir. 1983).

269 Id. at 565.

270 Id.

271 Id. at 566.

272 United States v. Carrasco, 786 F. 2d 1452 (9th Cir. 1986). United States v. DeBright, 730 F. 2d 1255 (9th Cir. 1984). United States v. Pollock, 726 F. 2d 1463 (9th Cir. 1983).

273 Uniform Code of Military Justice (hereinafter cited as UCMJ with appropriate article number), 10 U.S.C.A. Sections 801-940. (West 1983 & Supp. 1987). U.S. CONST. art. 1, section 8.

274 Id.

275 UCMJ, art. 45, supra note 273. Article 45, UCMJ, is set forth in Appendix B.

276 Id.

277 Id.

278 UCMJ, art. 36, supra note 273.

279 EXECUTIVE ORDER 12473 of the President of the United States, Manual for Courts-martial, United States, 1984 (hereinafter cited as MCM, 1984 with appropriate paragraph designation).

280 MCM, 1984, Rule 910, Rules for Courts-martial (hereinafter cited as RCM 910), supra note 279. RCM 910 is set forth in Appendix C. See also Rule 11, supra note 153.

281 RCM 910, supra note 280, at section (a). Rule 11, supra note 153, at section (a). UCMJ, art. 45, supra note 275.

282 RCM 910, supra note 280, at section (c). Rule 11, supra note 153, at section (c).

283 RCM 910, supra note 280, at section (d). Rule 11, supra note 153, at section (d).

284 RCM 910, supra note 280, at section (e). Rule 11, supra note 153.

285 RCM 910, supra note 280, at section (f). Rule 11, supra note 153, at section (e).

286 MCM, 1984, Rule 705, Rules for Courts-martial (hereinafter cited as RCM 705), supra note 279. RCM 705 is set forth in Appendix D.

287 Id. at section (a). United States v. Caruth, 6 MJ 184 (CMA 1979).

288 RCM 705, supra note 286, at section (b).

289 Id. at section (c).

290 Id. at section (d).

291 RCM 910, supra note 280, at section (f).

292 RCM 910, supra note 280, at section (f).

293 RCM 910, supra note 280, at section (h).

294 RCM 910, supra note 280. Rule 11, supra note 153.

295 RCM 910, supra note 280, at section (i). Rule 11, supra note 153, at section (g).

296 The original UCMJ was enacted by Pub. L. No. 506, 64 Stat. 1080 (codified at 50 U.S.C. Sections 551-736 (1950)) (hereinafter cited as UCMJ, 1950). The original version of Article 45, UCMJ is set forth as follows:

(a) If an accused arraigned before a court-martial makes any irregular pleading, or after a plea of guilty sets up matter inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect, or if he fails or refuses to plead, a plea of not guilty shall be entered in the record, and the court shall proceed as though he had pleaded not guilty.

(b) A plea of guilty by the accused shall not be received to any charge or specification alleging an offense for which the death penalty may be adjudged.

Compare to the current version of UCMJ, art. 45 infra Appendix B.

297 See UCMJ, art. 45, supra note 275.

298 Act of Oct. 24, 1968, Pub. L. 90-632, 1968 U.S. CODE CONG. & AD. NEWS 4501, 4511.

299 UCMJ, 1950, supra note 296, at art. 27. An accused was entitled to be represented by a non-legally trained defense counsel at a special court-martial.

300 UCMJ, 1950, supra note 296, at art. 19.

301 Senate Rpt. No. 486, June 10, 1949, 1950 U.S. CODE CONG. & AD. NEWS 2222, 2245 (emphasis added).

302 Id.

303 EXECUTIVE ORDER 10214 of the President of the United States, Manual for Courts-martial, United States, 1951 (hereinafter cited as MCM, 1951, with appropriate paragraph designation), para. 70.

304 EXECUTIVE ORDER 11476 of the President of the United States, Manual for Courts-martial, United States, 1969 (hereinfter cited as MCM, 1969, with appropriate paragraph designation), para. 70.

305 Id. at para. 48.

306 MCM, 1951, supra note 303, at para. 70. MCM, 1969, supra note 304, at para. 70. RCM 910, supra note 280.

307 UCMJ, 1950, supra note 296, at art. 45. Senate Rpt. No. 486, supra note 301, at 2245.

308 United States v. Hook, 20 USCMA 516, 43 CMR 356 (1971).

309 United States v. Terry, 21 USCMA 442, 45 CMR 216 (1972).

310 18 USCMA 335, 40 CMR 247 (1969).

311 Id.

312 Id.

313 RCM 910, supra note 280, at section (c).

314 10 USCMA 353, 27 CMR 427 (1959).

315 3 MJ 51 (CMA 1977).

316 United States v. Brown, 1 M.J. 465 (CMA 1976).

317 United States v. Lynch, 2 M.J. 214 (CMA 1977). United States v. Bowers, 1 M.J. 200 (CMA 1975). United States v. Harden, 1 M.J. 258 (CMA 1976). United States v. Castrillon-Moreno, 7 M.J. 414 (CMA 1979). United States v. Dowd, 7 M.J. 445 (CMA 1979). United States v. Hedland, 7 M.J. 271 (CMA 1979). United States v. Walls, 9 M.J. 88 (CMA 1980). United States v. Hunt, 10 M.J. 222 (CMA 1981).

318 United States v. Shirley, 18 M.J. 212 (CMA 1984). United States v. Williams, 18 M.J. 186 (CMA 1984).

319 United States v. Scholten, 17 M.J. 171 (CMA 1984).

320 United States v. Vaughan, 2 M.J. 797 (CMA 1976).

321 United States v. Pretlow, 13 M.J. 71 (CMA 1982).

322 United States v. Bright, 20 M.J. 661 (NMCMR 1985).

323 United States v. Tunnell, 23 M.J. 110 (CMA 1986).

324 United States v. Bedania, 12 M.J. 373 (CMA 1982). United States v.Cubral, 20 M.J. 269 (CMA 1985).

325 United States v. Dudley, 21 M.J. 615 (AFCMR 1985).

326 United States v. Wesley, 19 M.J. 534 (NMCMR 1984).

327 RCM 910, supra note 280, at section (d).

328 United States v. Frederick, 23 M.J. 561 (ACMR 1986).

329 United States v. Caruth, 6 M.J. 184 (CMA 1979).

330 United States v. Peters, 11 M.J. 875 (NMCMR 1981).

331 United States v. Bethke, 13 M.J. 71 (CMA 1982).

332 United States v. Hobart, 22 M.J. 851 (AFCMR 1986).

333 United States v. Henry, 18 M.J. 773 (NMCMR 1984).

334 17 M.J. 115 (CMA 1984). See also United States v. Miles, 12 M.J. 377 (CMA 1982).

335 17 M.J. at 123. See also United States v. Brown, 4 M.J. 654 (ACMR 1977).

336 Supra notes 310; 311; 312 and accompanying text.

337 18 USCMA 335, 40 CMR 247.

338 Id.

339 United States v. Martin, 4 M.J. 852 (ACMR 1978).

340 United States v. Jemmings, 1 M.J. 414 (CMA 1976).

341 United States v. Peterson, 1 M.J. 972 (CMA 1976). United States v. Herald, 17 M.J. 1118 (NMCMR 1984).

342 RCM 910, supra note 280, at section (d).

343 12 M.J. 373 (CMA 1982).

344 7 M.J. 409 (CMA 1979).

345 United States v. Thomas, 22 M.J. 388 (CMA 1986).

346 1 M.J. 453 (CMA 1976).

347 Id. See also United States v. Elmore, 1 M.J. 262 (CMA 1976).

348 1 M.J. at 456.

349 Id. RCM 910, supra note 280, at section (f).

350 United States v. Covington, 12 M.J. 932 (NMCMR 1982).

351 3 M.J. 458 (CMA 1977).

352 United States v. Crawford, 11 M.J. 336 (CMA 1981).

353 United States v. Taylor, 21 M.J. 1016 (ACMR 1986).

354 United States v. Walters, 5 M.J. 829 (ACMR 1978).

355 United States v. Kazena, 11 M.J. 28 (CMA 1981).

356 United States v. Sharper, 17 M.J. 803 (ACMR 1984). United States v. Elliot, 10 M.J. 740 (NCMR 1981).

357 United States v. Partin, 7 M.J. 409 (CMA 1979). United States v. Koopman, 20 M.J. 106 (CMA 1985).

358 United States v. Dimpster, 6 M.J. 824 (NCMR 1979).

359 United States v. Cooke, 11 M.J. 257 (CMA 1981).

360 United States v. Dawson, 10 M.J. 142 (CMA 1981). United States v. Connell, 13 M.J. 156 (CMA 1982).

361 United States v. Cifuentes, 11 M.J. 385 (CMA 1981).

362 United States v. Allen, 6 M.J. 633 (CGCMR 1978).

363 10 M.J. 32 (CMA 1980).

364 United States v.Dinkel, 13 M.J. 400 (CMA 1982).

365 See United States v. Hinton, 10 M.J. 136 (CMA 1981). United States v. Passini, 10 M.J. 108 (CMA 1980).

366 United States v. Cabral, 20 M.J. 269 (CMA 1985).

367 United States v. Elmore, 1 M.J. 262 (CMA 1976).

368 United States v. Schaffer, 12 M.J. 425 (CMA 1982).

369 United States v. Castleberry, 18 M.J. 826 (ACMR 1984).

370 United States v. Zalenski, 24 M.J. 1 (CMA 1987). United States v. Schmeltz, 1 M.J. 8 (CMA 1975). United States v. Blevins, 22 M.J. 817 (NMCMR 1986).

371 United States v. West, 13 M.J. 800 (ACMR 1982).

372 United States v. Cabral, 20 M.J. 269 (CMA 1985).

373 United States v. Jones, 23 M.J. 305 (CMA 1987).

374 United States v. Kitts 23 M.J. 105 (CMA 1986).

375 United States v. Cummings, 17 USCMA 376, 38 CMR 174 (1968).

376 United States v. Mills, 12 M.J. 1 (CMA 1981).

377 United States v. Dawson, 10 M.J. 142 (CMA 1981). United States v. Connell, 13 M.J. 156 (CMA 1982).

378 23 M.J. at 108.

379 23 M.J. at 307.

380 Id. at 306. See also United States v. Zalenski, 24 M.J.

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381 UCMJ, art. 45, supra note 275. RCM 910, supra note 280, at section (e).

382 RCM 910, supra note 280, at section (e). United States v. Chambers, 12 M.J. 443 (CMA 1982).

383 18 USCMA 535, 40 CMR 247.

384 Id.

385 United States v. Diaz-Padilla, 17 M.J. 752 (ACMR 1984). 12 M.J 443.

386 United States v. Kazena, 11 M.J. 28 (CMA 1981).

387 United States v. Moglia, 3 M.J. 216 (CMA 1977). United States v. Johnson, 1 M.J. 36 (CMA 1975).

388 United States v. Bethke, 13 M.J. 71 (CMA 1982). United States v. Zieran, 15 M.J. 511 (ACMR 1982). United States v. Lee, 16 M.J. 278 (CMA 1983).

389 United States v. Graves, 20 M.J. 344 (CMA 1985).

390 United States v. Blanchard, 19 M.J. 196 (CMA 1985).

391 United States v. Johnson, 1 M.J. 36 (CMA 1975).

392 United States v.Leverette, 9 M.J. 627 (ACMR 1980).

393 United States v. Bobroff, 23 M.J. 872 (NMCMR 1987).

394 United States v. Cimoli, 10 M.J. 516 (AFCMR 1980).

395 RCM 910, supra note 280, at section (e), Discussion. United States v. Foster, 14 M.J. 246 (CMA 1982).

396 United States v. Stener, 14 M.J. 972 (ACMR 1982). United States v. Sanders, 7 M.J. 913 (ACMR 1979). United States v. Crouch, 11 M.J. 128 (CMA 1981). United States v. Brown, 22 M.J. 448 (CMA 1986). United States v. Desha, 23 M.J. 66 (CMA 1986).

397 United States v. Lee, 16 M.J. 278 (CMA 1983). United States v.Smith, 14 M.J. 68 (CMA 1982). United States v. Reynolds, 20 M.J. 118 (CMA 1985).

398 United States v. Shackleford, 2 M.J. 17 (CMA 1976). United States v. Davenport, 9 M.J. 364 (CMA 1980).

399 United States v. Jackson, 23 M.J. 650 (NMCMR 1986).

400 RCM 910, supra note 280, at section (h)(2). United States v. Matthews, 16 M.J. 354 (CMA 1983). United States v. Lee, 16 M.J. 278 (CMA 1983).

401 United States v. Jemmings, 1 M.J.. 414 (CMA 1976).

402 United States v. Maydwell, 23 M.J. 656 (AFCMR 1986).

403 United States v. Palus, 13 M.J. 179 (CMA 1982).

404 United States v. Bailey, 21 M.J. 244 (CMA 1986).

405 United States v. Buske, 2 M.J. 465 (ACMR 1975).

406 United States v. Lee, 16 M.J. 278 (CMA 1983).

407 Id.

408 United States v. Butler, 20 USCMA 247, 43 CMR 87 (1977). United States v. Luebs, 20 USCMA 475, 43 CMR 315 (1971). United States v. Moglin, 3 M.J. 216 (CMA 1977).

409 7 M.J. 898 (AFCMR 1980). See also United States v. Whelehan, 10 M.J. 566 (AFCMR 1980).

410 18 USCMA 535, 40 CMR 247.

411 United States v. Palos, 20 USCMA 104, 42 CMR 296 (1970).

412 United States v. Lasagni, 8 M.J. 627 (NMCMR 1979).

413 RCM 910, supra note 280, at sections (a); (c)(1), Discussion.

414 RCM 910, supra note 280, at sections (c); (d).

415 RCM 910, supra note 280, at sections (e); (f).

416 28 CMR 527 (ACMR 1959).

417 12 M.J. 673 (ACMR 1981).

418 Id. at 674.

419 14 M.J. 641 (ACMR 1982).

420 Id. at 642.

421 Supra notes 273-295 and accompanying text.

422 Cook, Courts-martial: The Third System in American Criminal Law, 1978 SO. ILL. U. L. J. 1, 25 (1978).

423 Supra notes 172-199 and accompanying text.

424 Id.

425 Supra notes 172-199 and accompanying text.

426 Supra notes 200-219; 327-345 and accompanying text.

427 Id.

428 Id.

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506 Supra note 484 and accompanying text.

507 Id. In the fall of 1986, this author conducted research which indicated that, during a two year span in San Diego County, California, an area in which approximateely 120,514 active duty military personnel are stationed, no more than one active duty juvenile is processed per year in the County's Juvenile System on non-traffic criminal charges. San Diego

County has a larger number of active duty juveniles than most areas because one of the two male Marine Corps Recruit Training Centers and one of the two male Navy Recruit Training Centers are located there. (Research paper on file with author.)

508 Supra notes 273-295 and accompanying text.

509 400 U.S. at 38, F.N. 11.

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514 Supra notes 436-440 and accompanying text.

515 Id.

516 See MCM, 1984, Rule 701, Rules for Court-martial, supra note 279.

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551 Supra notes 275-277; 296-307 and accompanying text.

552 Infra, Appendix D.

553 274 U.S. at 223.

554 Infra, Appendix E.

555 400 U.S. 25.

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558 Supra notes 520-529 and accompanying text.

559 Infra, Appendix F.

560 Supra notes 443-466 and accompanying text.

561 Supra notes 445-466 and accompanying text.

562 Supra notes 273-307; 484 and accompanying text.

563 UCMJ, art 58(a), supra note 43. Article 58(a), UCMJ was enacted in response to COMA's holding in United States v. Simpson, 10 USCMA 27 CMR 303 (1959).

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